(37)

No: 99-1178-CFX Title: SoIid Waste Agency of Northern Cook County, Petitioner
v.
United States Army Corps of Engineers, et al.

Docketed:
January 14, 2000 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Dec 15 1999	Application (99A508) to extend the time to file a petition for a writ of certiorari from January 5, 2000 to January 14, 2000, submitted to Justice Stevens.
	Dec 16 1999	Application (99A508) granted by Justice Stevens extending the time to file until January 14, 2000.
	Jan 14 2000	Petition for writ of certiorari filed. (Response due March 15, 2000)
	Feb 9 2000	Motion of Pacific Legal Foundation and Randy Peterson for leave to file a brief as amici curiae filed.
	Feb 11 2000	Order extending time to file response to petition until March 15, 2000.
	Feb 11 2000	This extension is granted for all respondents.
	Feb 16 2000	Waiver of right of respondent Village of Barlett to respond filed.
	Mar 13 2000	Motion of Cargill, Inc. for leave to file a brief as amicus curiae filed.
	Mar 15 2000	Brief of respondents United States Army Corps of Engineers, et al. in opposition filed.
	Mar 15 2000	Motion of National Association of Home Builders for leave to file a brief as amicus curiae filed.
	Mar 15 2000	Motion of American Farm Bureau Federation for leave to file a brief as amicus curiae filed.
	Mar 27 2000	Reply brief of petitioner Solid Waste Agency of Northern Cook County filed.
	Mar 29 2000	DISTRIBUTED for Conference of April 14, 2000
	May 15 2000	REDISTRIBUTED for Conference of May 18, 2000
	May 22 2000	Motion of Pacific Legal Foundation and Randy Peterson for leave to file a brief as amici curiae GRANTED.
	May 22 2000	Motion of National Association of Home Builders for leave to file a brief as amicus curiae GRANTED.
	May 22 2000	Motion of American Farm Bureau Federation for leave to file a brief as amicus curiae GRANTED.
	May 22 2000	Petition GRANTED. SET FOR ARGUMENT October 31, 2000. **********
	Jun 1 2000	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 27, 2000.
	Jun 5 2000	DISTRIBUTED. June 8, 2000 (Page 16)
	Jun 6 2000	Motion of petitioner to dispense with printing the joint appendix filed.
	Jun 12 2000	Motion of Cargill, Inc. for leave to file a brief as amicus curiae GRANTED.
	Jun 21 2000	Motion of petitioner to dispense with printing the joint appendix DISTRIBUTED (6/22/00).

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No. 99-1178-CFX

Entry	Date	Proceedings and Orders
	Jun 26 2000	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Jul 25 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jul 25 2000	Brief amicus curiae of Defenders of Property Rights filed.
	Jul 26 2000	Brief amicus curiae of National Association of Home Builders filed.
	Jul 26 2000	Brief amici curiae of Cato Institute and Institute for Justice filed.
	Jul 26 2000	Brief amici curiae of Nationwide Public Projects Coalition, et al. filed.
	Jul 27 2000	Brief of petitioner Solid Waste Agency of Northern Cook County filed.
	Jul 27 2000	LODGING consisting of twenty spiral bound volumes of official documents in the record that do not appear in the JA, submitted by counsel for the petitioner.
	Jul 27 2000	Brief amicus curiae of Cargill, Inc. filed.
	Jul 27 2000	Brief amicus curiae of National Stone Association filed.
	Jul 27 2000	Brief amici curiae of Pacific Legal Fdtn.,Randy Peterson,and CA Cattlemen's Assn. filed.
	Jul 27 2000	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed.
	Jul 27 2000	Brief amicus curiae of Center for Original Intent of the Constitution filed.
	Jul 27 2000	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
	Jul 27 2000	Brief amicus curiae of James J. Wilson filed.
	Jul 27 2000	Brief amici curiae of Arid Operations, Inc., et al. filed.
	Jul 27 2000	Brief amici curiae of American Forest & Paper Association, et al. filed.
	Jul 27 2000	Brief amicus curiae of Alabama filed.
	Jul 27 2000	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Jul 27 2000	Brief amicus curiae of Center for Individual Rights filed.
	Jul 27 2000	Brief amici curiae of Serrano Water District, et al. filed.
	Jul 27 2000	Appendix of Serrano Water District, et al. filed.
	Jul 27 2000	LODGING consisting of eleven copies of additional material submitted by counsel for amici Serrano Water District, et al.
	Jul 27 2000	Brief amici curiae of American Farm Bureau Federation, et al. filed.
	Aug 2 2000	Order extending time to file respondents' brief on the merits to and including September 20, 2000. Reply briefs, if any, are due on or before October 20, 2000.
	Sep 5 2000	Record filed.
	Sep 20 2000	Brief of the Federal Respondents filed.
	Sep 20 2000	Brief amici curiae of Environmental Defense, et al. filed.
	Sep 20 2000	Brief amici curiae of Gene Likens, et al. filed.
	Sep 20 2000	Brief of respondents Village of Barlett and Citizens Against the Balefill filed.
	Sep 20 2000	Brief amici curiae of California, et al. filed.

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Entry	Date	Proceedings and Orders
	Sep 20 2000	Brief amici curiae of Anti-Defamation League, et al. filed.
	Sep 22 2000	CIRCULATED.
	Oct 13 2000	Reply brief of petitioner Solid Waste Agency of Northern Cook County filed.
	Oct 27 2000	Record filed.
	Oct 31 2000	ARGUED.

Supreme Court, U.S.
FILED
JAN 14 2000

No. 991178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Solid Waste Agency of Northern Cook County, which comprises 23 Cook County, Illinois municipalities, acquired a 500-acre-plus site to construct an urgently needed balefill facility to dispose of its communities' non-hazardous solid waste. Petitioner's plans called for filling some 17 acres of permanently or seasonally wet depressions left by earlier strip mining operations. The U.S. Army Corps of Engineers twice informed petitioner that it had no jurisdiction over the site, then abruptly changed its mind on the sole basis that the isolated waters on the site were used by migratory birds. The Corps relied on its so-called "migratory bird rule," which interprets the Clean Water Act to reach isolated intrastate waters that do or potentially could serve as habitat for migratory birds. Because the Corps asserted jurisdiction, petitioner was required to apply for a permit to fill the waters on the site pursuant to Section 404 of the Clean Water Act. The Corps denied petitioner's permit application, thereby destroying a significant municipal public works project important to some 700,000 local residents.

The question presented in this case, as to which the courts of appeals are in conflict, is as follows:

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the Solid Waste Agency of Northern Cook County, a municipal corporation created by intergovernmental agreement under the laws of Illinois. Its member communities are the cities and villages of Arlington Heights, Barrington, Buffalo Grove, Elk Grove Village, Evanston, Glencoe, Glenview, Hoffman Estates, Inverness, Kenilworth, Lincolnwood, Morton Grove, Mt. Prospect, Niles, Palatine, Park Ridge, Prospect Heights, Rolling Meadows, Skokie, South Barrington, Wheeling, Wilmette, and Winnetka. SWANCC has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondents are the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency; Arthur Williams, Lieutenant General, Chief of Engineers, U.S. Army Corps of Engineers; Robert E. Slockbower, Lieutenant Colonel, Chicago District Engineer, U.S. Army Corps of Engineers; Togo D. West, Jr., Secretary of the Army; Carol M. Browner, Administrator, U.S. Environmental Protection Agency; and intervenors below, the Village of Bartlett and Citizens Against the Balefill.

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Bablo, Leslie Salt Co. v. United States: *Does the Recent Supreme Court Decision in* United States v. Lopez *Dictate the Abrogation of the "Migratory Bird Rule"?*, 14 TEMP. ENVT'L L. & TECH. J. 277 (1995) 15

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THE FEDERALIST (C. Rossiter ed. 1961) 27

Gilbert, *The Migratory Bird Rule After* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695 (1998) 14

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Holman, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVT'L L.J. 139 (1995) 26

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Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1267 (1995) 14

Lessner, Leslie Salt Co. v. United States: *Keep the Birds Out of Your Birdbath: It May Be Considered The Jurisdiction of the Army Corps of Engineers as a "Water of the United States,"* 2 VILL. ENVT'L L.J. 463 (1991) 15

Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998) 14

Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) 14, 25

R. PETERSON, A FIELD GUIDE TO BIRDS (4th ed. 1980) 25

S. REP. NO. 92-1236, 92d Cong., 2d Sess. (1972) 21

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Solid Waste Agency of Northern Cook County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (App., *infra*, 14a-36a) is reported at 998 F. Supp. 946. The U.S. Army Corps of Engineers' decision denying petitioner's revised Section 404 permit application is set out at Pet. C.A. App. 85-171 (decision) and U.S. C.A. App. 29-189 (appendices).

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. On December 16, 1999, Justice Stevens extended the time for filing the petition for certiorari to and including January 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution provides in relevant part that "Congress shall have Power * * * To regulate Commerce * * * among the several States." U.S. CONST. art. I, § 8.

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1344(a) and 1362(7), are reproduced at App., *infra*, 37a-38a. The pertinent regulation, 33 CFR § 328.3(a)(3) (the "other waters rule"), and preamble to 51 Fed. Reg. 41,206 (1986) (the "migratory bird rule"), are reproduced at App., *infra*, 39a-40a.

STATEMENT

The issue in this case is whether, pursuant to the Clean Water Act ("CWA" or "Act"), the U.S. Army Corps of Engineers ("Corps") properly has jurisdiction over isolated waters that are not navigable and not connected or adjacent to navigable waters, but that do or could provide habitat for migratory birds. The Corps has asserted such jurisdiction in this case and others through its "migratory bird rule" (App., *infra*, 40a), which interprets the navigable "waters of the United States" subject to the CWA to include all waters that are an actual or potential habitat for migratory birds.

The Corps' unprecedentedly broad claim of jurisdiction has caused sharp disagreement among the courts of appeals. The Fourth Circuit has rejected the Corps' jurisdictional grab as contrary to the text of the CWA and constitutionally impermissible. *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). The Seventh and Ninth Circuits, in contrast, have upheld the Corps' authority. App., *infra*, 1a-13a; *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir. 1995) (*Leslie Salt II*). Even the Ninth Circuit, however, recognized that "[t]he migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Id.* at 1396. Mirroring this circuit split, Justice Thomas and a number of appellate judges have criticized the Corps' position in individual concurrences and dissents. *Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari); see *infra*, pp. 12-13.

The Seventh Circuit's ruling in this case is legally erroneous. The notion that the Corps has jurisdiction over isolated intrastate waters based merely on the actual or potential presence of migratory birds is inconsistent with the plain language and legislative history of the CWA. The migratory bird rule also raises substantial constitutional concerns under the Commerce Clause, which mandate a

narrower reading of the Act to avoid the constitutional difficulty. In those circumstances, the Corps' migratory bird rule is entitled to no deference under *Chevron*, and it should be set aside.

Given the split among the circuits and the statutorily and constitutionally untenable basis of the Corps' assertion of jurisdiction, it is time for this Court to address the question presented. Review of the Corps' migratory bird rule in *this* case is *especially* appropriate and necessary. The Corps' unfounded claim of jurisdiction has brought to an abrupt halt the coordinated efforts of 23 municipalities to address the important local problem of the disposal of solid waste generated by their 700,000 citizens, derailing a vital, $20-million-plus public project. Cooperative, multi-municipality efforts to address common local issues are not properly matters for federal control. Yet so expansive is the migratory bird rule that it is difficult to imagine any significant state or municipal project (or private development) that would not require the Corps' approval.

Beyond that, the ubiquitous presence of migratory birds, which number in the billions, means that land-use matters traditionally subject to local control are now dependent upon federal approval by the Corps sitting as a sort of super zoning body determining the "public interest." That federalization of local land-use matters is not what Congress had in mind when it adopted the CWA, and the Commerce Clause does not permit it.

A. The Statutory And Regulatory Scheme

The CWA prohibits the discharge of "pollutants," including dredged and fill materials, into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" are defined in the CWA only as "the waters of the United States." § 1362(7).

The Corps has defined the "waters of the United States" in regulations to include not only navigable waters, tidal waters, and waters adjacent to such waters, but also

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce * * *.

33 CFR § 328.3(a)(3) (1998), App., *infra*, 39a.[1]

In the preamble to regulations promulgated in 1986, the Corps further defined these "other" waters:

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * *.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986), App., *infra*, 40a. It is the Corps' reliance on this "migratory bird rule" —which the Corps never promulgated in accordance with Section 553 of the Administrative Procedure Act and which therefore has never been subject to notice and comment[2]—that petitioner challenges as a legally improper basis for federal jurisdiction over petitioner's proposed balefill site.

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[1] The Environmental Protection Agency has issued an identical definition, 40 CFR § 230.3(s), which is not directly at issue here.

[2] See *Tabb Lakes Ltd.* v. *United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (the migratory bird rule is invalid as a substantive rule promulgated without notice and comment), aff'd, 885 F.2d 866 (4th Cir. 1989).

B. SWANCC's Balefill Project And The Corps' Exercise Of Jurisdiction

The Solid Waste Agency of Northern Cook County ("SWANCC") is a municipal corporation comprised of 23 municipalities located in northern and northwestern Cook County, Illinois. SWANCC was formed to develop a system for the safe and efficient disposal of non-hazardous municipal waste for the approximately 700,000 people who live in its member communities. As part of its mission, SWANCC proposed to locate and develop a site for disposal of that waste. App., *infra*, 2a.

SWANCC purchased a 533-acre parcel of land to create a balefill—a landfill where baled, rather than loose, waste is dumped—on 410 acres of the site located exclusively in Cook County. Part of the balefill site was agricultural land and part, 298 acres, an "early successional stage forest" that had grown up on land previously used as a strip mine for gravel. The forested portion of the site contained "a labyrinth of trenches and other depressions" left by the strip mining. These trenches and depressions collect rainwater during some or all of the year, forming "permanent or seasonal ponds" ranging from one-tenth of an acre to several acres in size, and from a few inches to several feet in depth. App., *infra*, 2a.

In 1987, after ten public hearings and 2,500 pages of testimony, the local zoning board and the Cook County Board of Commissioners approved SWANCC's balefill project. Pet. C.A. App. 54. In 1989, SWANCC further obtained a permit for the project from the Illinois Environmental Protection Agency, which had reviewed SWANCC's 1,700 page application and conducted four days of hearings. *Id.* at 50-51, 55-56. Because SWANCC planned to fill 17.6 acres of trenches and depressions within the forested area to construct the balefill, it also requested rulings from the Corps of Engineers as to whether it required a permit under Section 404 of the CWA, 33 U.S.C. § 1344(a). After conducting an on-site

inspection, the Corps informed SWANCC in 1986 and again in 1987 that those 17.6 acres were not subject to the Corps' regulatory authority over "navigable waters" and that a Section 404 permit was not required. App., *infra*, 3a-4a, 16a.

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that its staff had observed migratory bird species on the property during a brief site visit. App., *infra*, 4a. Based on that assessment, and invoking its "migratory bird rule," the Corps concluded that the isolated, intrastate strip-mining depressions on the balefill site were "navigable" "waters of the United States" within its jurisdiction under the CWA because they "are used or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

In response to the Corps' assertion of jurisdiction, SWANCC submitted an application for a Section 404 permit, which the Corps denied in 1991. The Corps also denied SWANCC's revised application in 1994. App., *infra*, 4a.[3]

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[3] The court of appeals incorrectly assumed the Corps had determined that migratory birds actually used waters on the balefill site as habitat. App., *infra*, 10a. To be sure, the Corps stated, in denying SWANCC's permit application, that "the water areas are used as habitat by migratory bird[s] which cross state lines." But it did so based not on any recorded observation of birds using the water areas as habitat, but based solely on the fact that thirteen species of migratory birds observed at least once on the 533-acre site "are known to depend on aquatic environments for a significant portion of their life requirements." Pet. C.A. App. 78; see also *id.* at 94, 780-781. Nothing in this case turns, however, on whether the balefill site was actually or only potentially habitat for migratory birds. Though the extension of federal jurisdiction to wet areas that *might* be used by migratory birds may be even more statutorily and constitutionally problematic, there is no basis for jurisdiction over actual habitat either.

C. SWANCC's Challenge To The Migratory Bird Rule And The District Court's Ruling

In December 1994, SWANCC brought suit against the Corps in the District Court for the Northern District of Illinois. SWANCC challenged both the merits of the Corps' decision and the theory under which it asserted jurisdiction. Both sides moved for summary judgment on the issue of jurisdiction, and, on March 25, 1998, the district court granted summary judgment for the Corps on that question. App., *infra*, 14a.

The district court rejected SWANCC's contention that the migratory bird rule exceeds the bounds of the Corps' authority to define "navigable waters" and "waters of the United States." The court recognized that "the Fourth Circuit reached the opposite conclusion in *United States* v. *Wilson*." App., *infra*, 30a. But it "decline[d] to follow" *Wilson*, holding that the migratory bird rule is justifiable because one purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 29a, quoting 33 U.S.C. § 1251(a).

The district court also rejected SWANCC's argument that the Commerce Clause and *United States* v. *Lopez*, 514 U.S. 549 (1995), bar the migratory bird rule and require the statute to be read more narrowly. App., *infra*, 30a-31a. Distinguishing *Wilson* and *Lopez*, the court relied on prior circuit precedent and *Leslie Salt II* to conclude that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Ibid.*; see also *id.* at 17a-24a. Subsequently, SWANCC dismissed the remainder of its claims and the district court entered final judgment for the Corps. *Id.* at 2a.

D. The Seventh Circuit's Decision

The Seventh Circuit affirmed. It first rejected SWANCC's argument that the migratory bird rule violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrow interpretation of "navigable" "waters of the United States." App., *infra*, 5a-9a. The court acknowledged that the migratory bird rule can be justified, if at all, only under the third prong of federal regulatory power set forth in *Lopez*: "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a, quoting 514 U.S. at 558-559. It then held that although the Corps had made no showing that the use of SWANCC's balefill site by migratory birds had any effect on interstate commerce, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." App., *infra*, 6a. Finally, the court held that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." *Id.* at 7a.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court of appeals held that the "scope of the Act reaches as many waters as the Commerce Clause allows." Accordingly, it concluded, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the * * * Corps to interpret the Act in such a manner." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split as to the jurisdictional reach of the CWA, and because the Seventh Circuit reached a decision in this case that is

erroneous as a matter of statutory interpretation and constitutional law and seriously infringes on prerogatives reserved to States and municipalities in our system of federalism.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE ISOLATED INTRASTATE WATERS BASED ON THEIR ACTUAL OR POTENTIAL USE BY MIGRATORY BIRDS

In *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 129 (1985), this Court upheld the Corps' construction of the Clean Water Act to cover not only "navigable or interstate waters and their tributaries" but also wetlands *"adjacent"* to such waters. (Emphasis added). This Court reserved and did "not express any opinion" regarding the Corps' much more ambitious claim of authority "to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water"—referencing specifically the Corps' claim in 33 CFR § 328.3(a)(3) to have jurisdiction over "other waters * * * the use, degradation or destruction of which could affect interstate commerce." 474 U.S. at 131 n.8. The courts of appeals have disagreed about the question reserved in *Riverside Bayview Homes*, including about the very furthest reach of the Corps' assertion of jurisdiction over "other waters," the migratory bird rule.

1. The Fourth Circuit in *Wilson* held "invalid" the Corps' "other waters" regulation, 33 CFR § 328(a)(3)—the regulation that the migratory bird rule expressly purports to "clarif[y]" (App., *infra*, 39a)—on the ground that it "exceeded [the Corps' regulatory power] under the Clean Water Act." 133 F.3d at 257. Had Congress enacted § 328(a)(3) as a statute, the court pointed out, "it would present serious constitutional difficulties * * * under the Commerce Clause," because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters." *Ibid.* But, the court held, because the other

waters regulation "is not a statute," "[a]bsent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' * * * Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Ibid.*

In addition to identifying constitutional difficulties with the Corps' claim to jurisdiction over "other waters," the Fourth Circuit held that § 328(a)(3) "expands the statutory phrase 'waters of the United States' beyond its definitional limit." 133 F.3d at 257. "[A]s a matter of statutory construction," the Fourth Circuit held, "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to interstate or navigable waters." *Ibid.*

The Seventh Circuit thought *Wilson* irrelevant for two reasons, both mistaken. First, *Wilson* "involved a challenge to 33 C.F.R. § 328(a)(3)," while SWANCC "limited its objections to the propriety of the migratory bird rule as an interpretation of" § 328(a)(3). App., *infra*, 10a. Obviously, however, the Fourth Circuit would not, under its reasoning, uphold an *interpretation* or *clarification* of the very regulation it held invalid: *Wilson* effectively struck down not just § 328(a)(3), but also the migratory bird rule. That is especially clear because the migratory bird rule even more broadly interprets "waters of the United States" than the underlying regulation. Instead of requiring a connection or potential connection with *interstate commerce*, like the regulation, the rule only requires a connection or potential connection with *migratory birds* that are "protected by Migratory Bird Treaties" or "cross state lines." App., *infra*, 40a.

Second, the Seventh Circuit pretended that the *Wilson* ruling was limited to the question whether "Congress may regulate waters based on their *potential* to affect interstate

commerce." App., *infra*, at 10a. As the quotations from *Wilson* set out above show, *Wilson* cannot be so narrowly cabined. The Fourth Circuit struck down the "other waters" rule because it does not require a showing of a "substantial effect on interstate commerce" or a "nexus" with navigable or interstate waters. 133 F.3d at 257. Unsurprisingly, since it is solely an interpretation of § 328(a)(3), the migratory bird rule does not require a showing of a substantial effect on interstate commerce or any nexus with navigable or interstate waters either. The Fourth Circuit's Commerce Clause analysis thus applies equally to the migratory bird rule. The Seventh Circuit also simply ignored the alternative *statutory* basis for the *Wilson* decision. *Ibid.* Without doubt, the Fourth Circuit holds the migratory bird rule, as well as the regulation it interprets, beyond the Corps' statutory authority because it requires no connection to navigable or interstate waters or waters closely related thereto.

Wilson cannot be distinguished, and it is flatly at odds with the Seventh Circuit's decision in this case that the migratory bird rule is constitutionally unproblematic and statutorily authorized, as well as with the similar decisions of other circuits. See *Leslie Salt Co.* v. *United States* (*Leslie Salt I*), 896 F.2d 354, 360 (9th Cir. 1990) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species"); *Utah* v. *Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984) (upholding Corps jurisdiction over intrastate lake because its waters were used for fisheries and to irrigate crops which were subsequently marketed interstate, it was visited by out-of-state tourists, and it was on migratory bird flyways).

Had SWANCC's balefill been located in the Fourth Circuit, the result in this case would certainly have been different. This Court should not tolerate a circuit split on an issue as important as the scope of federal jurisdiction under national legislation like the Clean Water Act. Municipalities

and other landowners are entitled to consistent treatment under the CWA throughout the country; the fate of their projects should not turn on the happenstance of where their land is located. And the need for national uniformity is especially great because anyone planning to dredge or fill waters within the Corps' jurisdiction must obtain a permit or risk facing *criminal sanctions*. See, *e.g.*, *Wilson*, 133 F.3d 251 (criminal convictions at issue). Whether an act is a federal crime or not should not depend on where in the country the act takes place.

2. Justice Thomas questioned the validity of the Corps' migratory bird rule in his dissent from the denial of certiorari to review the *Leslie Salt II* decision. He stated that the issue presented in that case—as here—"raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the Clean Water Act." *Cargill, Inc.* v. *United States*, 516 U.S. 955, 959 (Thomas, J., dissenting from denial of certiorari).

Justice Thomas observed that "[t]he basis asserted to create federal jurisdiction over petitioner's land"—"the actual or potential presence of migratory birds on petitioner's land" —is "even more far-fetched than that offered, and rejected, in *Lopez*." 516 U.S. at 957-958. Justice Thomas described as "improper" the Corps' "assumption * * * that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction." *Id.* at 958. He observed that in *Leslie Salt*, as here, the Corps made "no showing that humans ever went to petitioner's property to hunt, trap, or observe migratory birds," or "that the cumulative effect of land use involving * * * wholly isolated [waters] would have a substantial effect on interstate commerce." *Id.* at 959. There was, in short, absolutely no explanation how "the activity on the land to be regulated * * * substantially affect[ed] interstate commerce." *Ibid.*

Justice Thomas concluded that the migratory bird rule "likely stretches Congress' Commerce Clause powers beyond breaking point" and expressed, "[i]n light of *Lopez*, * * * serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land." 516 U.S. at 958.

Although Justice Thomas' position did not garner four votes to review the *Leslie Salt II* decision, review of the migratory bird rule has since become more urgent with the Fourth Circuit's 1997 rejection of the Corps' jurisdiction over "other waters" in *Wilson*.

3. Circuit judges have been equally critical of the "other waters" and migratory bird rules in individual opinions. In his concurrence in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 999 F.2d 256, 262-263 (7th Cir. 1993), for example, Judge Manion concluded both that the CWA gives no federal jurisdiction over "isolated wetlands" that "have no effect on the waters of the United States," and that even if it did, "the Commerce Clause does not empower Congress to regulate isolated wetlands * * *. To hold otherwise would be, in effect, to hold that Congress' power under the Commerce Clause is virtually limitless." *Id.* at 263; see also *ibid.* ("The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink").[4] Judge Rymer, in her separate opinion in *Leslie Salt I*, was likewise unimpressed with the legal basis for the Corps' migratory bird rule. *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., concurring in part and dissenting in part); see also *United States* v. *Larkins*, 852 F.2d 189, 193-194 (6th Cir. 1988) (Merritt, J., concurring);

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[4] Judge Manion's analysis is more fully set forth in his subsequently vacated opinion for the Seventh Circuit in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 961 F.2d 1310 (7th Cir. 1992).

Leslie Salt II, 55 F.3d at 1396 ("The migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason").

It is no surprise, given these disagreements, that the Corps' jurisdictional grab has also drawn considerable scholarly attention. By and large, commentators recognize that the Corps' exercise of jurisdiction over "isolated waters" and migratory bird habitat pushes the edges (at the very least) of federal Commerce Clause power. *E.g.*, Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained").[5]

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[5] See also, *e.g.*, Gilbert, *The Migratory Bird Rule After* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1696 (1998) (noting "concerns" regarding the validity of the migratory bird rule "in view of the *Lopez* decision"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 414 (1998) (isolated wetland regulations "will be susceptible to Commerce Clause attack because they are indefensible as proper regulations of 'commerce' under any untortured definition of the word"); Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U.L. REV. 931, 950 (1997) (explaining that in light of *Lopez*, the migratory bird rule "could be in jeopardy"); Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVT'L L. & POLICY FORUM 321, 351 (1997) ("A rule permitting jurisdiction to be determined solely by potential use of a wetland by migratory birds is arguably too tenuously connected to interstate commerce to trigger the commerce power in light of *Lopez*'s substantiality requirement"); Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1267 (1995) ("It is unreasonable to argue that the potential use of an isolated wetland by any species of migratory bird substantially affects interstate commerce"); Bablo, Leslie Salt Co. v. United States: *Does the Recent Supreme Court Decision in* United States v. Lopez *Dictate the Abrogation of the "Migratory Bird Rule"?*, 14 TEMP. ENVT'L L. & TECH. J. 277, 278 (1995) ("the very tenuous tie between migratory birds and interstate commerce does not satisfy the tests of the Commerce Clause enunciated in *Lopez*"); Lessner, Leslie Salt Co. v. United States: *Keep the Birds Out of Your Birdbath: It May Be Considered The Jurisdiction of the Army Corps of Engineers as a "Water of the United States,"* 2 VILL. ENVT'L L.J. 463, 500 (1991) (expressing doubt that a migratory bird habitat "can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction").

Beyond the clear circuit split with *Wilson*, the separate opinions by Justice Thomas and others and the wealth of critical academic commentary demonstrate the diversity of views on the propriety of the migratory bird rule and show that confusion in this area will continue and likely escalate absent this Court's immediate intervention.

II. THE MIGRATORY BIRD RULE IS AN IMPERMISSIBLE INTERPRETATION OF THE CWA

The Seventh Circuit's decision to defer to the Corps' interpretation of the Clean Water Act is incorrect. Courts properly defer to an agency's interpretation of a statute "only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992). A court "ascertains [whether] Congress had an intention on the precise question at issue" by "employing traditional tools of statutory construction," including analysis of the text, structure, "history and policy of the Act." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 , 843 n.9, 862 (1984). Applying that familiar

standard, the migratory bird rule is invalid. It is inconsistent with the language and history of the CWA, and it fails to pass muster under established canons of interpretation requiring that a statute be construed to avoid raising serious constitutional questions and to avoid impinging on areas traditionally regulated by the states.

A. The Plain Language of the Act Requires Jurisdictional Waters To Be Related To Navigable Waters

The plain language of the CWA prohibits discharges into "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). The Corps and the court below played favorites with these terms, ignoring the phrase "navigable waters" and focusing exclusively on the phrase "waters of the United States." App., *infra*, 9a. But "'[j]udges should hesitate * * * to treat [as surplusage] statutory terms in any setting.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). The statutory phrases "navigable waters" and "waters of the United States" are *both* essential to divining congressional intent. The former concept, properly understood, forecloses the Corps' migratory bird rule.

1. "Navigable waters" is a term of art that traditionally meant "waters navigable in fact" (*The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)), but that was refined over time to include those waters capable of navigation through reasonable improvements. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 298-299 (1940); see BLACK'S LAW DICTIONARY 1179 (4th ed. 1968); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962) (statutory terms are generally to be given their established common law meaning). No one asserts that the gravel-mining depressions on SWANCC's property are navigable in either sense.

2. The Seventh Circuit ignored this settled common-law meaning of "navigable waters" and treated that statutory phrase as surplusage. It justified that approach by pointing to the CWA's definition of "navigable waters" as the "waters of the United States," then treating *that* phrase as the sole source of limits on the Corps' jurisdiction. App., *infra*, 9a.

It was error for the court of appeals to write the phrase "navigable waters" out of the CWA. In fact, the meaning of the phrase "waters of the United States," while somewhat broader than "navigable waters," is informed by and *incorporates the idea of navigability*. As this Court has held, the phrase means those waters which "form in their ordinary condition by themselves, or by uniting with other waters, *a continued highway over which commerce is or may be carried on* with other States or foreign countries *in the customary modes in which such commerce is conducted by water*." *The Daniel Ball*, 77 U.S. at 563 (emphasis added); see also *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874).

Thus, as the Fourth Circuit explained in *Wilson*, "the phrase 'waters of the United States' when used to define the phrase 'navigable waters'" naturally "refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." 133 F.3d at 257. The migratory bird rule, like the regulation it purports to interpret, "defines 'waters of the United States' to include waters that need have nothing to do with navigable or interstate waters," and deserves no deference because it "expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Ibid.*

3. The Seventh Circuit's reliance on this Court's decision in *Riverside Bayview Homes* as support for its interpretation of the CWA is misplaced. This Court explained in *Riverside Bayview* that Congress' use of the phrase "waters of the United States" in the CWA evidences an intent to "regulate at least *some* waters that would not be deemed 'navigable' under the classical understanding," and in that sense (only), the concept of navigability "is of limited import" in the CWA. *Riverside Bayview Homes*, 474 U.S. at 133 (emphasis added). Nowhere, however, has this Court suggested that the

Corps can ignore altogether the concept of navigability, as it does in its "other waters" and migratory bird rules.

To the contrary, in stark contrast to Corps' sweeping definition of "waters of the United States," the definition this Court found reasonable in *Riverside Bayview*—navigable waters and their "adjacent wetlands"—does accord with the traditional interpretation of "waters of the United States" as a "continued highway for commerce." "Adjacent wetlands" abut navigable waters, thus forming a "continued highway" and becoming "waters of the United States." *The Daniel Ball*, 77 U.S. at 563; *The Montello*, 87 U.S. at 443; see also *DeLovio* v. *Boit*, 7 F.Cas. 418, 423 (Cir. Ct., D.Mass. 1815) (Storey, J.) ("marsh land, bordering on the sea" may be within the admiralty jurisdiction). Isolated, man-made depressions that fill with rainwater are not remotely similar. Thus, *Riverside Bayview* provides no support for the extraordinary extension of federal jurisdiction over local land use approved by the Seventh Circuit.

4. The only statutory analysis engaged in by the court below was its iteration of the purpose of the Act, which includes the phrase "biological integrity" and the goal of ensuring "water quality which provides for the protection and propagation of * * * wildlife." App., *infra*, 10a. But "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action * * * and, in the end, prevents the effectuation of congressional intent." *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).

In contrast to the highly generalized purposes of the Act relied on by the Seventh Circuit, the CWA's text is specific and transparently clear. When it enacted the CWA, Congress was no stranger to the terms "navigable waters" and "waters of the United States," including their common law meanings and alternatives. It had previously used both concepts "to

determine the extent of the authority of the [Corps] under the Rivers and Harbors Appropriation Act of 1899," 33 U.S.C. § 403. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979). Congress' choice to use those well-understood terms to define the scope of the CWA should not be treated lightly, and it supports the Fourth Circuit's view of the Corps' jurisdiction, not the Seventh Circuit's interpretation.

Equally telling, in the Federal Power Act Congress gave an agency authority over activities not only on "navigable waters," but also on streams *"other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States."* 16 U.S.C. § 817 (emphasis added).[6] It follows that "Congress knew how to draft a statute to reach" all nonnavigable waters over which Congress has Commerce Clause jurisdiction. *Bailey*, 516 U.S. at 150. That Congress used no similar language in the CWA indicates that, contrary to the ruling below, it did not intend the CWA to apply so broadly.

B. Legislative History Confirms That Congress Did Not Intend The Corps To Base Jurisdiction Merely On The Presence Of Migratory Birds

This Court will not defer to an agency construction where "the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233 (1986). Such is the case here.

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[6] It is noteworthy that even under the broadly worded Federal Power Act, this Court has refused to extend congressional authority to "intrastate nonnavigable waters which do not flow into any navigable streams." *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90, 97 & n.9 (1965).

1. Section 404(a) and the definition of "navigable waters" as "waters of the United States" originated in the Federal Water Pollution Control Act Amendments of 1972. In the thousands of pages of legislative history of those amendments, isolated waters are mentioned not once. Neither the government nor the court below has produced a single such reference. Yet the extension of federal jurisdiction to isolated waters implicates many millions of acres. Given the important policy and political interests at stake in drawing the boundary line between federal and local control of development, such a vast expansion of federal authority over heretofore local concerns would hardly have passed in silence.

Congressional statements about the language that was used in the statute—"navigable waters" and "waters of the United States"—reflect established common law definitions. See 118 CONG. REC. H33,756 (1972) (statement of Rep. Dingell, House floor manager); *id.* at H33,699 (statement of Sen. Muskie, Senate floor manager). By defining "navigable waters" as "waters of the United States," the legislative history shows, Congress merely sought to avoid giving "navigable waters" its most "limited" or "technical" meaning—navigable in fact—"derived from the *Daniel Ball* case." *Id.* at H33,756 (Rep. Dingell). Congress wanted a definition "in line with more recent judicial opinions" that "expanded that limited view of navigability * * * to include waterways which would be 'susceptible of being used * * * with reasonable improvement,' as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." *Ibid.*, quoting *United States* v. *Utah*, 283 U.S. 64, 72 (1931). See also *ibid.* (Rep. Dingell quotes cases, which all involve waters previously or currently obstructed to navigation). In other words, the text was designed to reference the broader definitions of "navigable waters" and "waters of the United States" established by this Court. See also 118 CONG. REC. H33,699 (statement of Sen. Muskie).

In light of these explanations, the statement in the House and Senate conference reports that "[t]he conferees fully intend that *the term 'navigable waters'* be given the broadest possible constitutional interpretation" is clear. S. REP. No. 92-1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); see also H.R. REP. No. 92-911, 92d Cong., 2d Sess. 131 (1972). Congress simply meant that the CWA should reach waters capable of *navigation* by reasonable improvement, consistent with this Court's decisions in cases such as *Appalachian Electric* and *United States* v. *Utah*. It does *not* mean, as the Seventh and Ninth Circuits have held, that the CWA "reaches as many *waters* as the Commerce Clause allows." App., *infra*, 9a (emphasis added); *Leslie Salt I*, 896 F.2d at 360. Had that been Congress' intent, it would have said so expressly, as it did in the Federal Power Act.

2. No different message was sent by Congress when, in 1977, it rejected amendments that would have limited the Corps' authority to waters navigable in fact and their adjacent wetlands. This Court concluded in *Riverside Bayview Homes* that Congress' inaction showed that "the scope of the Corps' asserted jurisdiction *over wetlands* was specifically brought to Congress' attention," and that "even those who thought that the Corps' existing authority under § 404 was too broad" recognized that existing legislation should be read to cover *adjacent* wetlands. 474 U.S. at 137-138 (emphasis added). Neither conclusion supports the migratory bird rule.

First, the migratory bird rule was not officially promulgated by the Corps until 1986. 51 Fed. Reg. 41206, 41217 (1986); App., *infra*, 39a. Absent clairvoyance, Congress could not have "acquiesced in the Corps' definition of waters" (474 U.S. at 138) in the migratory bird rule by its failure to act in 1977. See *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., dissenting) (rejecting argument that Congress acquiesced in the migratory bird rule because "[t]his 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the [CWA] of

1977"). Second, even the government has not ventured to suggest that "even those who thought that the Corps' existing authority under § 404 was too broad" would comfortably read the existing legislation to cover isolated intrastate depressions visited by migratory birds. Nor could it: the migratory bird rule marks the very furthest extent of asserted federal jurisdiction and is a giant leap beyond the normal bases upon which the federal government inserts itself into local affairs. In sum, the legislative history of Section 404 provides no support for, but contradicts, the migratory bird rule.

C. No Deference Is Owed To The Migratory Bird Rule Because It Raises Serious Constitutional Concerns

1. The migratory bird rule is also entitled to no deference because it raises "serious constitutional concerns" and "there is another interpretation that may fairly be ascribed" to the Act. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); see also *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (when an agency's "exercise of its jurisdiction * * * would give rise to serious constitutional questions" no deference is owed unless the regulation denotes "the affirmative intention of the Congress clearly expressed"). The Commerce Clause "is subject to outer limits." *Lopez*, 514 U.S. at 557. The migratory bird rule hovers around or exceeds those limits, at minimum raising "serious constitutional questions." Even *defenders* of the migratory bird rule acknowledge that it "tests the limits of Congress' commerce powers, and, some would argue, the bounds of reason." *Leslie Salt II*, 55 F.3d at 1396.

2. The Seventh Circuit recognized that the migratory bird rule can be justified, if at all, only as regulation of an activity that "substantially affect[s]" interstate commerce. App., *infra*, 6a-7a; *Lopez*, 514 U.S. at 558-559. But the court did not rest its decision that the rule is constitutionally unproblematic on a showing by the Corps that filling gravel-mining depressions

on SWANCC's property would "substantially" affect interstate commerce. The terms of the migratory bird rule require nothing more than the particular waters in question "are or would be used" as a habitat by migratory birds that are protected by international treaty or that "cross state lines" (App., *infra*, 40a), and the Corps made no showing beyond that requirement when it determined that SWANCC's balefill property is within its jurisdiction. See App., *infra*, at 6a (acknowledging that any impact on birds on SWANCC's property "has no discernible effect on interstate commerce"). The migratory bird rule's lack of any connection to commerce, reflected in the Corps jurisdictional determination in this case, renders the basis for federal jurisdiction "even more farfetched than that offered, and rejected in *Lopez*" and raises "serious doubts" about the "propriety of the Corps' assertion of jurisdiction." *Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari).

3. The Seventh Circuit avoided the difficulty that migratory bird use of SWANCC's property has "no discernable effect on interstate commerce" by theorizing that the "cumulative impact" of "the destruction of migratory bird habitat" "substantially affects" interstate commerce in hunting and birdwatching. App, *infra*, 6a-7a.[7] The commerce power may not be extended by that kind of bootstrapping.

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[7] The Seventh Circuit disregarded the fact that there has never been a "showing that the cumulative effect of land use involving * * * *water that is wholly isolated from any water used, or usable, in interstate commerce*" would have a substantial effect on migratory birds, much less "a substantial effect on interstate commerce." *Cargill*, 516 U.S. at 959 (Thomas, J.) (emphasis added). There is no evidence that the numbers of any commercially relevant bird species would diminish as a result of the Corps not regulating isolated waters. The speculative assumption that filling a particular intrastate pond or trench will have a noticeable effect on migratory birds, which in turn will have a substantial effect on commerce, depends on "pil[ing] inference upon inference," an approach rejected in *Lopez*. 514 U.S. at 567.

To be sure, "[w]here the class of activities is regulated and that class is within the reach of federal power" because of its aggregated effect on commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971), quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). But "the *de minimis* character of individual instances * * * is of no consequence" *only* when those instances are "essential part[s]" of "a general regulatory statute" that "bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. Here, isolated, purely intrastate wet areas are *not* within the class obviously regulated by Congress in the CWA, nor did Congress show any concern in the CWA with migratory birds as a class. And the Corps has never explained how preventing the filling of isolated, intrastate, man-made depressions is "essential" to any goal identified by Congress in the CWA.

The "regulated class" approach to Commerce Clause analysis, which recognizes federal jurisdiction despite the lack of any significant effect on commerce of particular regulated circumstances, should have no application in cases such as this where there is a glaring disconnect between the class covered by the statute ("navigable" "waters of the United States") and the asserted basis of an agency's jurisdiction (migratory birds), and where the agency has failed to show that extending its jurisdiction is essential to the achievement of any statutory goal. See, *e.g.*, *United States* v. *Bird*, 124 F.3d 667, 676 (5th Cir. 1997) (rejecting the government's claim that "Congress need only identify a broad 'class of activities' and determine that, viewed in the aggregate, the class 'substantially affects' interstate commerce," requiring instead the separate incidents be connected to interstate commerce).[8]

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[8] Professor Nagle points out that this Court "has said little about how far Congress can reach in aggregating activities or how one decides what aggregations are permissible." But he notes that the "available clues counsel against overly broad aggregations" like that relied on below: "*Lopez* rejects any Commerce Clause test that every conceivable federal statute could satisfy. The Court's frequently stated concern about federalism pushes toward less sweeping aggregations. And lower courts have rejected the contention that Congress can satisfy the Commerce Clause simply by choosing a broad category of activities whose aggregate effect on interstate commerce is substantial." 97 MICH. L. REV. at 197-198 (footnotes omitted). See also 1 L. TRIBE, CONSTITUTIONAL LAW 825 n.68 (3d ed. 2000) ("*Lopez* leaves unanswered many questions regarding focus and levels of generality [in aggregation] that were raised by *Wickard* and its progeny"). Review in this case would give this Court an opportunity to guide the lower courts in their application of the aggregation principle, which has taken on greater practical significance after *Lopez*.

4. The migratory bird rule contains no "jurisdictional element which would ensure, through case-by-case enquiry" that particular isolated waters "affec[t] interstate commerce." *Lopez*, 514 U.S. at 561. Under the rule, it is enough that the waters "are or would be used as habitat" by any migratory bird. App., *infra*, 40a. Accordingly, the Corps conducted no analysis of the impact on commerce of filling the gravel-mining depressions on SWANCC's balefill site.

5. The basis of the Corps rule and assertion of jurisdiction here appears to be that the self-propelled flight of birds across state or national boundaries alone is enough to implicate the Commerce Clause, allowing regulation of every place where the birds might naturally stop. The ramifications of this assertion are astonishing. Approximately five billion land birds migrate across North America every year, with flyways covering the entire continental United States. THE ATLAS OF BIRD MIGRATION 54-83 (ed. J. Elphick 1995); R. PETERSON, A FIELD GUIDE TO BIRDS 305-370 (4th ed. 1980). By the Corps' rationale, the Commerce Clause would stretch to cover virtually every piece of property in the country,

regardless of its commercial or noncommercial use.[9] As in *Lopez*, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

At the very least, the migratory bird rule raises "serious constitutional concerns." *Edward J. DeBartolo Corp.*, 485 U.S. at 577; see *Cargill*, 516 U.S. at 959 ("This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the [CWA] that provide a compelling reason to grant certiorari") (Thomas, J.). Because the Corps' dubious approach lacks support in the text or legislative history, much less the requisite "clearest indication" of congressional support, the Seventh Circuit's deference to the rule cannot be sustained.

D. No Deference Is Owed To The Migratory Bird Rule Because It Impinges On Traditional State Powers

The migratory bird rule also runs afoul the interpretative principle that a court will not assume that Congress intended to substantially "alter sensitive federal-state relationships" by regulating conduct "traditionally subject to state regulation" unless Congress said so clearly. *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (if a federal law is to be read to "radically readjus[t] the balance of state and national

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[9] The government conceded as much at oral argument in *Hoffman Homes*. See 961 F.2d at 1321 n.9 (government conceded that its interpretation would allow it to regulate a puddle visited by migratory birds). See also Holman, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVT'L L.J. 139, 197 (1995) ("migratory flyways cover the entire United States and, as birdwatchers will attest, migratory birds will alight almost anywhere. Thus the migratory bird rule * * * operates as a limiter-manque—a limiting rule with no limits").

authority," "those charged with the duty of legislating [must be] reasonably explicit").

By vastly expanding federal jurisdiction to include tens of millions of acres of isolated intrastate waters and wetlands —traditionally the exclusive province of the States and their subdivisions—the migratory bird rule drastically alters "sensitive federal-state relationships," making the Corps a sort of super zoning board for all permanently or seasonally wet areas of the United States. Under the migratory bird rule, it is the Corps that ultimately decides whether a project is in the "public interest" (33 CFR § 320.4(a)), supplanting the considered judgments of state and local authorities, as it did in this case. Such a rule was not anticipated by Congress, much less clearly intended, and therefore cannot be sustained.

In light not only of *Lopez*, but also this Court's federalism jurisprudence in recent cases such as last Term's sovereign immunity decisions, *Printz* v. *United States*, 521 U.S. 898 (1997), *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *New York* v. *United States*, 505 U.S. 144 (1992), this Court should demand much clearer authority from Congress before permitting an agency to deprive states and municipalities of their traditional police powers over the use of land so ephemerally connected to interstate commerce. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 119 S. Ct. 2240, 2263 (1999). The Founders likewise understood that the States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961) (J. Madison).

BFP is instructive. There, this Court rejected an interpretation of the Bankruptcy Code that would have preempted state foreclosure law. The Court explained that the power to ensure the security of titles to real estate "inheres in the very nature of [state] government" and that the construction urged by the government would intrude on "the essential [state] sovereign interest in the security and stability of title to the land." 511 U.S. at 544 & n.8. This Court would not permit an interpretation of the Code that "displace[d] traditional state regulation in such a manner" absent a "'clear and manifest'" statement of congressional intent. *Id.* at 544; see also *Lopez*, 514 U.S. at 567-568 (emphasizing the need to maintain "a distinction between what is truly national and what is truly local").

The same principle governs here. The migratory bird rule allows for intrusive federal land-use regulation that impinges on "the authority of state and local governments to engage in land use planning," which this Court has recognized "as long ago as our decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). Because land-use decisions are the prerogative of States and their subdivisions, this Court has repeatedly deferred to these interests. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 4 (1974); *Village of Euclid*, 272 U.S. at 388; see also *Village of Belle Terre*, 416 U.S. at 13 (Marshall, J., dissenting on other grounds) ("zoning is a complex and important function of the State" which "may indeed be the most essential function performed by local government"). Just as federal courts "do not sit to determine whether a particular housing project is or is not desirable" (*Berman* v. *Parker*, 348 U.S. 26, 32 (1954)), so too should federal agencies forbear from becoming local land-use authorities.

Thus, the text and history of the CWA, together with important principles of statutory interpretation that serve to protect state and local powers from unintended federal interference, all indicate that the Corps' migratory bird rule

is an impermissible construction of the Act that is owed no deference. The Seventh Circuit's contrary decision is erroneous and should be reversed.

III. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *JONES* v. *UNITED STATES*

This Court has granted certiorari in *Jones* v. *United States*, No. 99-5739 (cert. granted Nov. 15, 1999), to decide whether interpreting the federal arson statute to reach intrastate arson of residential property is permissible in light of Commerce Clause constraints on federal power. See Order List, Nov. 15, 1999 (reformulating the question for review as "[w]hether, in light of *United States* v. *Lopez*, * * * and the interpretative rule that constitutionally doubtful constructions should be avoided, * * * [18 U.S.C.] Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is unconstitutional").

It appears likely that in *Jones* this Court will provide guidance as to the effect Commerce Clause concerns should have on the proper interpretation of jurisdictional grants in federal statutes. Stated in the abstract, that issue is of obvious relevance to this case: we contend that Commerce Clause problems raised by the migratory bird rule mean that it is an impermissible construction of the CWA under the established "interpretative rule that constitutionally doubtful constructions should be avoided." Nevertheless, holding this petition for *Jones* would not be useful or appropriate.

To begin with, this case and *Jones* involve very different statutes and entirely different factual bases that are alleged by the United States to provide a sufficient nexus to interstate commerce. There is no reason to believe that this Court's ruling whether a federal arson conviction may be based on the burned residence's receipt of out-of-state gas (and the like) will illuminate whether the presence of migratory birds is a proper basis for CWA jurisdiction. The different language of

the statutes involved, their different regulatory histories, and the vastly different questions whether the supply of natural gas to a residence or use of wet areas by migratory birds are "interstate commerce," suggest that however this Court decides *Jones*, the issue in this petition will remain alive and in urgent need of this Court's review.

The two cases also involve completely different Commerce Clause issues. *Jones* concerns a "case-by-case inquiry" into evidentiary sufficiency under a statutory jurisdictional element. This case raises the wholly different question of when deference is owed to agencies that seek to stretch their own jurisdiction to (or beyond) constitutional limits.

Moreover, the Seventh Circuit made abundantly clear that it regards protecting migratory bird habitat as implicating interstate commerce and sees no constitutionally doubtful interpretation at all in this case. A ruling in *Jones* that Commerce Clause problems are to be avoided by narrowing interpretations of jurisdictional grants would have no impact whatsoever on the Seventh Circuit on remand following a GVR, for the Seventh Circuit sees no conceivable Commerce Clause problem to begin with.

In light of these differences, and because the courts of appeals are in disarray as to an important issue concerning the scope of the Clean Water Act that will not be settled in *Jones*, we urge this Court to grant independent review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2000

APPENDIX

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Defendants-Appellees.

No. 98-2277.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 8, 1999.

Decided Oct. 7, 1999.

Before KANNE, DIANE P. WOOD, and EVANS, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*.

This case involves the efforts of a consortium of Illinois municipalities to find a place to dump their trash. The Solid Waste Agency of Northern Cook County ("SWANCC") thought that it had found such a spot in a 533-acre parcel of land straddling Cook and Kane Counties, Illinois. Before its "balefill" could open, however, approximately 17.6 acres of ponds and small lakes located on the parcel had to be filled in. This case presents the question whether the U.S. Army Corps of Engineers ("the Corps"), acting under § 404 of the Clean Water Act ("the Act"), 33 U.S.C. § 1344, had jurisdiction to require SWANCC to obtain a permit for its fill operations. SWANCC initially applied for such a permit, but the Corps denied it. SWANCC then sued, claiming both that the Corps had no business meddling in the matter at all and that it was wrong on the merits. For its part, the Corps claimed jurisdiction under the so-called "migratory bird rule," which interprets the Act as extending to certain intrastate

waters based on their actual or potential use as habitat for migratory birds. (The parties dispute whether this is a mere interpretation of statutory language, or something that should be regarded as a freestanding rule--a point that we discuss later in this opinion. Our use of the common phrase "migratory bird rule" is not intended to suggest a position on that issue.)

The district court granted summary judgment in the Corps' favor on the jurisdictional point. At that point, SWANCC decided voluntarily to dismiss the remainder of its claims, so that the district court could enter a final judgment from which it could appeal. See 28 U.S.C. § 1291. We conclude that the Corps properly asserted jurisdiction in this matter, and we therefore affirm.

I

SWANCC is a group of 23 municipalities that banded together to form a municipal corporation for the purpose of locating and developing a disposal site for nonhazardous waste. It found and purchased the 533-acre site to which we have already referred, from which it hoped to carve out approximately 410 acres for a "balefill"—that is, a landfill where the waste is baled before it is dumped. Approximately 298 acres of the proposed balefill site is what is known as an early successional stage forest. At one time, it was a strip mine, but when the mining operation shut down approximately 50 years ago, a labyrinth of trenches and other depressions remained behind. Over time, the land evolved into an attractive woodland vegetated by approximately 170 different species of plants. What were once gravel pits are now over 200 permanent and seasonal ponds. These ponds range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth. The forest is also home to a variety of small animals. Most important for our purposes are the 100-plus species of birds that have been observed there. These include many

endangered, water- dependent, and migratory birds. Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993.

This litigation arose because the proposed balefill project would require the filling of approximately 17.6 acres of semi-aquatic property within the forested area. Section 404 of the Act prohibits the discharge of fill material into "the navigable waters" without a permit issued by the Secretary of the Army, acting through the Chief of Engineers. 33 U.S.C. § 1344(a). The term "navigable waters" is defined in the statute as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the Act itself provides no further explanation of which waters are subject to § 404's requirements, regulations issued by the Environmental Protection Agency ("EPA") and the Corps define the phrase "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

In March 1986, SWANCC contacted the Corps to find out if a particular 267-acre parcel within the proposed balefill site included "wetlands" within the meaning of the Act, such that SWANCC would have to obtain a § 404 permit in order to fill it in. After an on-site inspection, the Corps initially decided that the site did not include protected wetlands and therefore did not fall within its regulatory jurisdiction. One year later, in February 1987, SWANCC contacted the Corps to request a determination as to whether a 414-acre parcel of

the site included "wetlands." The Corps again responded in the negative.

The Corps changed its position with regard to its jurisdiction over the balefill site, however, after the Illinois Nature Preserves Commission (a state agency) informed it that a number of migratory bird species had been observed there. This new information made all the difference to the Corps, because of the so-called migratory bird rule. This rule, or interpretive convention, reflects the fact that the definition of "waters of the United States" found in 33 C.F.R. § 328.3(a)(3) has long been understood by the EPA and the Corps to include all waters, including those otherwise unrelated to interstate commerce, "which are or would be used as habitat by birds protected by Migratory Bird Treaties" or "which are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (1986) ("1986 preamble"). In a letter to SWANCC dated November 16, 1987, the Corps explained that its two previous determinations that the site did not fall within its jurisdiction were based on its finding that the site did not meet the definition of "wetland." In contrast, the latest determination—that the Corps did have jurisdiction over the site—was based on a different theory entirely. Regardless of wetland status, it now appeared that the aquatic areas of the site "are or could be used as habitat by migratory birds which cross state lines." In response to the Corps' notification that it intended to exercise jurisdiction over the site, SWANCC submitted an application for a § 404 permit. The Corps denied that application, finding that all of the affected waters in the site were in fact used as habitat by migratory birds (and thus were not merely potential habitat). SWANCC then submitted a revised application that was also denied.

At this stage in the litigation, SWANCC has abandoned its challenge to the merits of the Corps' decisions and has instead focused exclusively on its challenge to the migratory

bird rule as a basis for the Corps' jurisdiction. Accordingly, we accept as true the Corps' factual findings with regard to SWANCC's permit application, including the crucial finding that the waters of this site were a habitat for migratory birds.

II

SWANCC offers three arguments to support its position that the Corps had no authority to require it to obtain a permit: (1) Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone; (2) the Corps exceeded its statutory authority in interpreting the Act to confer jurisdiction as provided by the migratory bird rule; and (3) the migratory bird rule is invalid because it was not promulgated in accordance with the notice and comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

We begin with the most ambitious of SWANCC's arguments, which is that the migratory bird rule is unconstitutional in light of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Prior to *Lopez*, it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds. See, *e.g.*, *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993); *Leslie Salt Co. v. United States (Leslie I)*, 896 F.2d 354, 360 (9th Cir.1990). We must decide whether *Lopez* now compels the opposite conclusion.

In *Lopez*, the Court reaffirmed the well-established principle that a federal statute based on the Commerce Clause must serve one of three purposes: (1) regulation of the channels of interstate commerce; (2) regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) regulation of activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624; see also *Hodel v. Virginia*

Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct 1357, 28 L.Ed.2d 686 (1971); *United States v. Wilson*, 159 F.3d 280, 285 (7th Cir. 1998). The gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third variety of regulatory power. The *Lopez* Court concluded that the statute before it, which made it a crime "knowingly ... [to] possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" did not meet the "substantially affects" test because (1) it was a criminal statute which, by its terms, had nothing to do with interstate commerce or commercial transactions; (2) it contained no jurisdictional element to ensure that in each case the firearm in question had in fact affected interstate commerce; and (3) Congress had offered no legislative findings to support the conclusion that possessing a gun in a school zone affected interstate commerce. *Lopez*, 514 U.S. at 559-62, 115 S.Ct. 1624; see also *Wilson*, 159 F.3d at 286.

SWANCC urges us to conclude that the migratory bird rule suffers from the same defects. But such a conclusion would overlook important differences between the statute before the Court in *Lopez* and the one we are considering. This court has noted previously that *Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce. *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997), citing *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624; see also *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999); *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998).

This approach, which is most closely associated with the Supreme Court's decision in *Wickard v. Filburn*, 317 U.S.

111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), indicates the relevant legal question for our case is whether the destruction of the natural habitat of migratory birds in the aggregate "substantially affects" interstate commerce. We observed in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993), that "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds." *Id.* at 261. Statistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Fish & Wildlife Service, U.S. Dep't of the Interior & Bureau of the Census, U.S. Dep't of Commerce, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 25 (November 1997). Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons. *Id.* at 45. There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

SWANCC objects that the migratory bird rule cannot serve to define the Corps' jurisdiction, because the rule excludes nothing. The United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds. However, any suggestion that next the Corps will be trying to regulate the

filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as SWANCC suggests, but rather "the place where a plant or animal species naturally lives or grows." Webster's Third New International Dictionary 1017 (1993). Before the Corps may assert jurisdiction under the migratory bird rule, it must first make a factual determination that a particular body of water provides a habitat for migratory birds, which it has done here.

Last, SWANCC offers a broad policy-based argument for rejecting jurisdiction under the migratory bird rule. The rule is, it claims, inconsistent with the principles of federalism that motivated the Court in *Lopez*, because it erodes the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624. But this argument works only if, as SWANCC asserts, the protection of migratory bird habitat is a matter of local concern only. Once again, that argument is refuted by the numerous international treaties and conventions designed to protect migratory birds, see, *e.g.*, Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990 (1972); Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., 50 Stat. 1311, T.S. No. 912 (1936); Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., 39 Stat. 1702, T.S. No. 628 (1916), as well as the case law recognizing the "national interest of very nearly the first magnitude" in protecting such birds, *North Dakota v. United States*, 460 U.S. 300, 309, 103 S.Ct. 1095, 75 L.Ed.2d 77 (1983); see also *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). Even less persuasive is SWANCC's suggestion that giving a federal agency (here, the Corps) the power to override decisions by local land use and zoning boards to permit the filling of local waters conflicts with notions of state sovereignty. To the

contrary, because the regulation of migratory bird habitat is a permissible exercise of Congress' authority, the Supremacy Clause, U.S. Const. art. VI, cl. 2., squarely supports the legitimacy of giving precedence to federal law in this area.

III

SWANCC next contends that, even if Congress lawfully could have granted the Corps jurisdiction over isolated bodies of water based on the presence of migratory birds, it did not do so. As noted above, the Act expressly limits the Corps' jurisdiction to "the waters of the United States." The EPA and the Corps have defined this term to include "[a]ll other waters ... the use, degradation or destruction of which could affect interstate or foreign commerce." They further have interpreted the phrase "could affect interstate or foreign commerce" as permitting jurisdiction based on the presence of migratory birds. It is this second level of agency interpretation that SWANCC deems excessive.

We review an agency's interpretation of a statute it is charged with administering under the standard outlined in, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first question is whether the plain meaning of the text of the statute either supports or opposes the regulation. If so, the analysis ends with the court's application of the plain meaning. *Id.* at 842, 104 S.Ct. 2778. But if the statute is either ambiguous or silent on the issue, the court must defer to the agency interpretation so long as it is based on a reasonable reading of the statute. *Id.* at 843, 104 S.Ct. 2778.

It is well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows. See, *e.g.*, *Rueth*, 13 F.3d at 231; *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979). Thus, if Congress possesses the power to regulate a body of water under the Act, generally this court will conclude that it has in fact done

so. Accordingly, because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner. Accord *Leslie Salt I*, 896 F.2d at 360.

SWANCC believes that this conclusion is at odds with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). *Wilson* involved a challenge to 33 C.F.R. § 328(a)(3), the regulation that defines "waters of the United States" to include all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." The court found the regulation to be an unreasonable interpretation of the Act based on its suspicion that Congress lacks the power to regulate waters that "could" affect interstate or foreign commerce. In our case, however, the question whether Congress may regulate waters based on their *potential* to affect interstate commerce is not presented, because the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats. Moreover, we note that SWANCC has not attacked 33 C.F.R. § 328(a)(3) here. Instead, it has limited its objections to the propriety of the migratory bird rule as an interpretation of 33 C.F.R. § 328(a)(3).

SWANCC's remaining statutory interpretation argument asks us to find the migratory bird rule unreasonable because it is designed to preserve wildlife rather than water quality. This point overlooks the fact that the Act's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). SWANCC's suggestion that the Corps' jurisdiction must be defined solely by reference to water quality is itself inconsistent with the Act and must be rejected.

IV

Last, SWANCC challenges the migratory bird rule on the ground that it was promulgated in violation of the notice and comment requirements of the APA. See 5 U.S.C. § 553. Our starting point here is with the fact that the APA does not require administrative agencies to follow notice and comment procedures in all situations. Section 553(b)(3)(a) specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the requirement. In order to succeed on its APA claim, then, SWANCC must convince us that the migratory bird rule is a legislative (also termed "substantive") rule, rather than an interpretive rule or policy statement. See *Metropolitan Sch. Dist. of Wayne Township v. Davila*, 969 F.2d 485, 489-90 (7th Cir. 1992); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984).

That, in our view, it cannot do. We explained the difference between legislative and interpretive rules at some length in *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165 (7th Cir. 1996), where we found that a rule requiring certain wild animal containment fences to be eight feet tall was legislative. The reason for this was straightforward: nothing in the idea of a "secure" containment could tell someone whether 7 1/2 feet, 8 feet, or 8 1/2 feet, would be "secure" enough. The statute in question (the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*) did not impose a duty to build a fence of a certain height. Instead, it authorized the agency to impose a specific obligation that would implement the general statutory goals. Here, the statute itself defines the jurisdictional reach of the Act, and regulations issued under the notice- and-comment procedures have elaborated further upon that definition. There is, following *Hoctor*'s common-sense approach, something to interpret here: the use of the term "waters" and "navigable waters" in 33 U.S.C. §§ 1344(a) and 1362(7), and the specific examples of such waters given in 33 C.F.R. § 328.3(a)(3).

It is also noteworthy that the migratory bird "rule" first made its appearance in the Federal Register publication of the Corps' 1986 recodification of the regulatory definition of "waters of the United States" in 33 C.F.R. § 328(a)(3), when it moved these rules from Part 323 to Part 328 of Title 33 of the Code. See 51 Fed. Reg. 41206, 41217 (1986). The preamble offered several examples of waters that came within the regulatory definition, including those used as habitat for migratory birds, as well as examples of waters that normally would not fall within the definition. This, in our view, was interpretation. Moreover, it is hard to see what would have been different if formal notice-and-comment rulemaking had been used, except perhaps the page of the Federal Register on which this statement appeared. We do not wish to discourage agencies from offering concrete examples of the ways in which their rules will apply, see *Hoctor*, 82 F.3d at 170, and we believe that is all that the Corps and the EPA did here.

The Corps has also argued that SWANCC's challenge to the migratory bird rule comes too late, because SWANCC did not file suit in the district court until December 1994, more than six years after the migratory bird rule was first published. There is a general six-year statute of limitations for civil actions against the United States found in 28 U.S.C. § 2401(a), which applies to lawsuits brought pursuant to the APA. See *Polanco v. United States Drug Enforcement Admin.*, 158 F.3d 647, 652 (2d Cir. 1998); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); see also *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 331 (7th Cir. 1993) (recognizing cases holding same, but not expressly reaching the issue). Even if the fact that the Corps did not raise this argument in the district court does not bar it now from making the argument, we doubt that a party must (or even may) bring an action under the APA before it knows that a regulation may injure it or even be applied to it. Compare *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (claim under the Federal Tort

Claims Act accrues at the time plaintiff knows of both the existence and cause of his injury). We therefore do not reach the Corps' limitations argument, since it would have no effect on the outcome in light of our resolution of SWANCC's substantive APA challenge.

We conclude that the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress' power under the Commerce Clause, and that it was reasonable for the Corps to interpret the Act as authorizing this regulation. Accordingly, we AFFIRM the judgment of the district court.

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants.

No. 94 C 7489.

United States District Court,
N.D. Illinois,
Eastern Division.

March 25, 1998.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

This action concerns the future of a 533-acre parcel of real estate owned by plaintiff Solid Waste Agency of Northern Cook County. Defendant United States Army Corps of Engineers asserted regulatory jurisdiction over the property after determining that it contained approximately fifty-five acres of navigable waters as defined by the Clean Water Act. 33 U.S.C. § 1362(7). It then denied plaintiff a permit to develop the property under section 404 of that statute. 33 U.S.C. § 1344(a). Plaintiff sought judicial review of these actions under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"), and the parties filed cross-motions for summary judgment on the issue of jurisdiction. For the reasons below, plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted.

I. Factual and Procedural Background

Plaintiff Solid Waste Agency of Northern Cook County ("SWANCC") is a municipal corporation created by

intergovernmental agreement under the laws of Illinois. Plaintiff owns a 533-acre parcel of real estate located in Cook and Kane Counties, which, due to its prior incarnation as a gravel mining pit, contains large surface depressions that now hold rainwater and other precipitation. Plaintiff sought to convert approximately 180 acres of the property into a balefill, a repository for non-hazardous solid waste that cannot be recycled or otherwise removed from the waste stream. The Army Corps of Engineers determined that 17.6 acres of the balefill area contained "navigable waters" as defined by the Clean Water Act, 33 U.S.C. § 1362(7), and it therefore required plaintiff to obtain a permit for the project under section 404(a) of that statute, 33 U.S.C. § 1344(a).

Section 404(a) of the Clean Water Act authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Clean Water Act defines navigable waters as "the waters of the United States." 33 U.S.C. § 1362(7). By regulation, the Army Corps of Engineers has further defined the phrase "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). In a preamble to this regulation, the Corps has explained that the term "other waters" includes those which "are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (Nov. 13, 1986). For lack of a better term, perhaps, this language in the preamble has been described as the "migratory bird rule."

On March 12, 1986, plaintiff invited the Corps to determine whether its property contained any "apparent wetlands." (R. 34,594.) On April 17, 1986, the Corps indicated that the SWANCC property did not contain any

wetlands or lakes as defined by 33 C.F.R. § 323.2(c) and (e). On February 25, 1987, after acquiring additional land, plaintiff again requested the Corps to indicate whether its property contained any "protected wetlands." (R. 34,598.) On March 4, 1987, the Corps issued a virtually identical letter stating that the property did not contain any wetlands or lakes under 33 C.F.R. §§ 323.2(b) or 328.3(b). In each letter, the agency stated that it did not have jurisdiction over the property and that plaintiff would not need a permit to develop it.

On July 8, 1987, the Illinois Nature Preserves Commission asked the Corps to consider whether the SWANCC property might be subject to federal jurisdiction under 33 C.F.R. § 328.3(a)(3) on the grounds that four different species of migratory birds had been observed there. The agency agreed, and on November 16, 1987 it asserted jurisdiction over the waters on the SWANCC property for the reason that they were used or could be used as a habitat by migratory birds. It explained that its previous denial of jurisdiction "was based on the fact that the water areas did not meet the definition of a wetland or lakes, and not on the broader definition of 'waters of the United States.'" (R. 34,619.) Plaintiff then submitted two successive applications for a section 404(a) permit to begin the balefill project. When those applications were denied, plaintiff filed the instant lawsuit.

The parties have filed cross-motions for partial summary judgment on the issue of whether the Army Corps of Engineers has regulatory jurisdiction over the 17.6 acres of water on the proposed balefill site. A supplemental brief in support of the government's motion was submitted by intervenor-defendants Village of Bartlett and Citizens Against the Balefill. Plaintiff has argued that the Corps lacks jurisdiction because (1) the migratory bird rule exceeds the legislative authority created by the commerce clause, (2) the agency's assertion of jurisdiction over the waters of the

proposed balefill was arbitrary and capricious, (3) the migratory bird rule goes beyond the mandate of the Clean Water Act, and (4) the rule was adopted in violation of the notice and comment requirements of the APA. On May 22, 1997, the court heard oral argument on these issues, and it will now address them in turn.

II. Discussion

A. Commerce Clause

Plaintiff contends that the waters of the proposed balefill site are not subject to federal regulatory jurisdiction under the commerce clause. It argues that the migratory birds on the balefill site do not have any relationship with interstate commerce because they do not support any human commercial activity on the site itself. Noting that the balefill area is closed to the public and is not visible from adjacent properties, plaintiff reasons that it cannot be subject to federal jurisdiction because "[b]irds do not conduct commerce, people do." (Pl.'s S.J. Mem. at 3.) The court must therefore decide whether the commerce clause authorizes the federal government to exercise regulatory jurisdiction over isolated intrastate waters that serve as a habitat for migratory birds.

The Seventh Circuit addressed this very issue in *Hoffman Homes, Inc. v. Administrator, U.S. EPA*, 961 F.2d 1310 (7th Cir. 1992) "*Hoffman Homes I*". In that case, a residential developer was fined after it filled a one-acre pond on its property without a permit. *Id.* at 1311. The EPA had asserted jurisdiction over the pond pursuant to 40 C.F.R. § 230.3(s)(3)[1] after finding that it could be used as a habitat by

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[1] The EPA's definition of "waters of the United States" at 40 C.F.R. § 230.3(s)(3) is identical to that adopted by the Army Corps of Engineers at 33 C.F.R. § 328.3(a). See *Hoffman Homes II*, 999 F.2d at 260.

migratory birds. *Id.* at 1311-1312. The Seventh Circuit held that the EPA had exceeded its authority under the commerce clause by extending jurisdiction over the pond based solely on its potential use as a habitat for migratory birds. *Id.* at 1321-1322. Reasoning that birds do not affect commerce until they are "watched, photographed, shot at or otherwise impacted by the people who do," *id.* at 1320, the court explained that:

> The EPA has provided evidence of only one interstate connection: [The pond] is a potential landing site for migratory birds. Although we recognize that the Commerce Clause power is broad, it has never been extended to reach all areas in (much less those only potentially in) migratory bird flyways. Such an extension, we believe, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. After all, what area of the United States is not a potential landing spot for migratory birds? The Commerce Clause, at the very least, requires some connection to human commercial activity.

Id. at 1321-1322 (citations omitted). In addition to holding that 40 C.F.R. § 230.3(s)(3) was unconstitutional, the court concluded that the regulation went beyond its statutory mandate because the Clean Water Act did not authorize the regulation of isolated intrastate wetlands. *Id.* at 1316.

On rehearing, the court vacated its first opinion and held that 40 C.F.R. § 230.3(s)(3) did not violate the commerce clause. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260-261 (7th Cir.1993) (*"Hoffman Homes II"*). The court explained that it was reasonable for the EPA to interpret the regulation as extending its jurisdiction to waters whose connection with interstate commerce was "potential rather than actual, minimal rather than substantial." *Id.* at 261. It further explained that the potential use of wetlands by migratory

birds was sufficient to invoke commerce clause jurisdiction because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds" and "the cumulative loss of wetlands has reduced populations of many bird species." *Id.* at 261. The court nevertheless ruled in favor of the developer because the EPA had not presented substantial evidence that the water site was a suitable or potential habitat for migratory birds. *Id.* at 261-262.

The Seventh Circuit has not been alone in suggesting that the migratory bird rule is a valid application of federal commerce clause power. In *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir.1990), a company sought to develop a property that contained surface depressions as a result of previous industrial usage. *Id.* at 355-356. The Army Corps of Engineers asserted jurisdiction over the site under 33 C.F.R. § 328.3(a) because the excavations collected water on a seasonal basis and could be used as a habitat for migratory birds. *Id.* at 357, 360. The district court held that the ponds were not "other waters" under 33 C.F.R. § 328.3(a) because they were not of a natural origin and were only seasonally filled. *Leslie Salt Co. v. United States*, 700 F.Supp. 476 (N.D. Cal.1988) (*"Leslie Salt I"*). The Ninth Circuit reversed, explaining that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir.1990) (*"Leslie Salt II"*). When the Court of Appeals remanded the case to the district court to determine whether the ponds could be used as a habitat by migratory birds, the district court found that the property was a seasonal home to more than fifty species of migratory birds and was thus subject to federal commerce clause jurisdiction. *Leslie Salt Co. v. United States*, 820 F.Supp. 478, 480 (N.D. Cal.1992) (*"Leslie Salt III"*). On a second appeal, the Ninth Circuit affirmed this

finding and reiterated that the migratory bird rule was a valid exercise of the federal commerce clause power. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir.1995) (*"Leslie Salt IV"*).

The Tenth Circuit reached a similar result in *Utah v. Marsh*, 740 F.2d 799 (10th Cir.1984). In that case, the Army Corps of Engineers asserted regulatory jurisdiction over an intrastate lake pursuant to a regulation which, like 33 C.F.R. § 328.3(a), conferred administrative authority over isolated wetlands whose degradation or destruction could affect interstate commerce. *Id.* at 802 & n. 4, 803. Plaintiff argued that the lake had no effect on interstate commerce because it was located entirely within the borders of the state. *Id.* at 803. The court explained that the lake was subject to federal commerce clause jurisdiction because, among other things, it was "on the flyway of several species of migratory waterfowl which are protected under international treaties." *Id.* at 804.

These cases establish that the commerce clause authorizes the federal government to regulate isolated intrastate waters that serve as a habitat for migratory birds. The reason for this rule, it seems, is that the cumulative degradation of intrastate waters could have a substantial effect on interstate commercial interests relating to those birds. See *Hoffman Homes II*, 999 F.2d at 261 ("cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"). Under this rule, a federal agency may assert jurisdiction over intrastate waters even if the destruction of those particular waters will not have a substantial effect on interstate commerce and there is no evidence that migratory birds support human commercial activity there.

There is reason to consider whether this rule remains valid after the recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). In that

case, the Supreme Court held that Congress exceeded its commerce clause powers by imposing criminal sanctions on the possession of handguns in local school zones. *Id.* 514 U.S. at 551, discussing 18 U.S.C. § 922(q). The government argued that the prevention of violent crime in local school zones was related to interstate commerce because education promotes a sound national economy, the threat of violence deters interstate travel, and the cost of violent crime is spread to the population as a whole through insurance. *Id.* at 563-564. After surveying the history of commerce clause jurisprudence, the Court explained that the commerce clause authorizes Congress to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or the persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *Id.* at 558-559. Deciding that only the last category applied to the statute in question, the Court held that the possession of a gun in a local school zone is not "an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. It further explained that the statute could not be sustained under case law upholding the regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561. The statute was therefore declared unconstitutional.

The Fourth Circuit has recently suggested that the migratory bird rule is unconstitutional under *Lopez*. In *United States v. Wilson*, 133 F.3d 251 (4th Cir.1997), the appellant was convicted of filling intrastate wetlands without a permit in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A) and 1311(a). *Id.* at 254. The Army Corps of Engineers had asserted jurisdiction over the fill areas pursuant to 33 C.F.R. § 328.3(a)(3), and the appellant challenged the validity of this regulation under both the Clean Water Act and the commerce clause. Writing for the majority, Judge

Niemeyer stated in dicta and without explanation that the regulation presented "serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause." *Id.* at 257. Writing separately, Judge Luttig declined to adopt this portion of the majority opinion on the grounds that it was based on an overly expansive reading of the commerce clause. See *Wilson*, 133 F.3d at 266 (Luttig, J., dis.).

Respectfully, this court does not agree that *Lopez* places the regulation of intrastate migratory bird habitats beyond the reach of federal commerce clause jurisdiction. It is well established that the commerce clause authorizes the federal government to regulate activities whose effect on interstate commerce is substantial only in the aggregate. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 127-128, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (commerce clause allows regulation of private commercial transactions that have a substantial effect on interstate commerce when "taken together with that of many others" but are otherwise trivial); *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) ("where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"); *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975) (purely intrastate activity may be regulated "where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations"). The Supreme Court expressly affirmed this line of cases in *Lopez*, 514 U.S. at 557, *quoting Wirtz*, 392 U.S. at 197 n. 27. Distinguishing *Wickard* on the facts, the *Lopez* Court held that the criminal statute at issue did not concern activities which might substantially affect interstate commerce through "repetition" or when "viewed in the aggregate." 514 U.S. at 560-561, 567. Thus, while the *Lopez* decision may help to define the outer limits of federal commerce clause jurisdiction, it does not signal a retreat from

the constitutional principles set forth in *Wickard* and its progeny.

The migratory bird rule finds ample support in this line of cases. Migratory birds have long been regarded as a proper subject for federal commerce clause regulation. See *Andrus v. Allard*, 444 U.S. 51, 63 n. 19, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) ("assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Hoffman Homes II*, 999 F.2d at 261 ("millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds"); *Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir.1937) (commerce clause allows federal government "to protect the game, nongame, and insectivorous birds which migrate with the changing seasons"). By implication, the power to protect migratory birds extends to the habitats in which they live. While the destruction of a single habitat is unlikely to affect the viability of migratory bird populations, the destruction of numerous such habitats may, in the aggregate, have a substantial affect on their livelihood. *See Hoffman Homes II*, 999 F.2d at 261 (cumulative loss of habitat has reduced the population of many bird species and has impaired the ability of people to hunt, trap, and observe them). On this point, the following analysis is persuasive:

> Isolated wetlands provide habitat to migratory birds whose continued existence supports billions of dollars in interstate commerce. The incremental destruction of migratory bird habitat directly and negatively impacts migratory bird populations and, thereby interstate commerce. Isolated wetlands are a crucial link in the direct chain of causation between healthy migratory bird populations and interstate commerce. It should, therefore, be irrelevant whether a migratory bird is ever observed, photographed, or hunted at the particular isolated wetland in question. Unlike in *Lopez*, the connection of isolated wetlands to interstate commerce is

well-documented and does not require the court to "pile inference upon inference" in a manner that gives rise to a general federal police power.

Lori J. Warner, "The Potential Impact of United States v. Lopez on Environmental Regulations," 7 *Duke Environmental Law & Policy Forum* 321, 354-355 (1997) (citations omitted). For these reasons, the commerce clause authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce.[2]

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[2] The court notes that the issues presented in this section have drawn considerable attention from academics. *See, e.g.*, Elaine Bueschen, "Do Isolated Wetlands Substantially Affect Interstate Commerce?" 46 *Am.U.L.Rev.* 931 (1997); Robert D. Icsman, "Hoffman Homes, Inc. v. Administrator, U.S. EPA: The Seventh Circuit Gets Bogged Down in Wetlands," 54 *Ohio St. L.J.* 809 (1993); Edward Alburo Morrissey, "The Jurisdiction of the Clean Water Act Over Isolated Wetlands: The Migratory Bird Rule," 22 *J. Legis.* 137 (1996); Dennis J. Priolo, "Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands," 30 *Land & Water L.Rev.* 91 (1995); Stephen Jay Stokes, "The Limit of Government's Regulatory Authority Over Non-Adjacent Wetlands: Hoffman Homes, Inc. v. EPA," 15 *Energy L.J.* 137 (1994); Lori J. Warner, "The Potential Impact of United States v. Lopez on Environmental Regulations," 7 *Duke Envtl. L. & Pol'y F.* 321, 354-355 (1997). While some complain that the migratory bird rule could bring every puddle and pond in the nation under the umbrella of federal control, this argument overlooks the fact that the question of federal jurisdiction has a substantial factual component that must be examined on a case-by-case basis. To establish that an intrastate waterway is subject to jurisdiction under the migratory bird rule, an agency must first determine as a factual matter that it bears the distinctive features of a "habitat."

B. Evidentiary Basis for Jurisdiction

Plaintiff argues that the agency's decision to extend jurisdiction over the proposed balefill site was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). It is well established that a final agency decision is entitled to a "presumption of regularity" and that the court must refrain from substituting its own judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The court must uphold the decision so long as it was based on a consideration of the relevant factors and was free from clear errors of judgment. *Id.* 401 U.S. at 416. The burden of persuasion rests on the party seeking to overturn the administrative decision. *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The court must therefore decide whether, based on the entire administrative record, it was reasonable for the Corps to determine that the proposed balefill site was "a suitable or potential habitat for migratory birds." *Hoffman Homes II*, 999 F.2d at 261.

The Army Corps of Engineers initially asserted jurisdiction over the waters of the SWANCC property after learning that four species of migratory birds were observed there by the Illinois Nature Preserves Commission. During the ensuing permit review process, the agency gathered an extensive volume of supplemental information about the avifauna and topography of the site. These included a catalogue of the avian and waterfowl species observed on or near the SWANCC site (R. 2,462-2,469; 40,328-40,358), two lengthy environmental impact reports describing the flora and avifauna of the property and the potential impact of the balefill project (R. 38,636-38,779; 40,409-40,512), and detailed information about specific migratory bird populations on the site (R. 2,428-2,461; 2,329-2,384; 45,885-45,887). The Corps argues that this evidence was more than sufficient

to support its finding that the waters of the SWANCC property were used as a habitat by migratory birds.

Plaintiff offers at least three reasons why the court should hold otherwise. First, plaintiff argues that the agency should have limited its analysis to the 17.6 acres of water in the permit area rather than considering the waters on the property as a whole. Plaintiff suggests that the record contains no evidence that the waters of the permit area itself serve as a habitat for migratory birds. Plaintiff relies on *Hoffman Homes II*, 999 F.2d at 261, where the Seventh Circuit determined that the EPA could not assert jurisdiction over a small pond based on evidence that a nearby but hydrologically dissimilar water area was a suitable habitat for migratory birds. Here, however, plaintiff has not explained how the waters on the balefill site are hydrologically distinct from those of the property as a whole. To the contrary, there is evidence that the SWANCC property is a "large, forested wetland complex" (R. 15,579) which contains an "extensive labyrinth of open water" (R. 40,334). By extending jurisdiction over the entire "labyrinth" of water on the site, the Corps implicitly determined that each component part of that system could serve as a habitat for migratory birds. Because plaintiff presents no evidence that the 17.6 acres of water in the permit area are distinct from those on the rest of the property, it has failed to show that the agency's jurisdictional decision was improper as to the permit site.

Second, plaintiff argues that the permit area should not be subject to federal jurisdiction because it cannot support a viable population of migratory birds.[3] Citing several studies,

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[3] The agency argues that the presence of migratory birds by itself is sufficient to create federal jurisdiction over the waters on the SWANCC property, and the quality of the habitat is only relevant to the permit determination. This overlooks the fact that federal jurisdiction extends only to habitats that are "suitable" for migratory birds. *Hoffman Homes II*, 999 F.2d at 261. The concept of viability is central to the jurisdictional analysis because it distinguishes genuine habitats from the "parking lot puddles" of concern in *Hoffman Homes II*, 999 F.2d at 262. The Supreme Court did not suggest otherwise in *Riverside*, 474 U.S. at 135 n. 9, where it explained that the Army Corps of Engineers has presumptive jurisdiction over all "adjacent wetlands" because most such wetlands have a substantial effect on interstate commerce, and thus the agency need not consider whether any particular wetland has a substantial effect on interstate commerce until the permit process. This analysis is inapposite here because the concept of viability is implicit in the term "habitat," while there is nothing in the term "adjacent wetland" which suggests that it must have a significant effect on interstate waters.

plaintiff predicts that veeries will be unable to breed successfully on its property. It argues that the great blue heron colonies are not subject to federal jurisdiction under the migratory bird rule because the herons nest in trees rather than in the water. Plaintiff also points out that several of the migratory bird species identified on the site between 1988 and 1992 were found only in small numbers or not at all in 1993. Although the Corps raises a number of compelling objections to these arguments, one is dispositive: Plaintiff has not addressed any of the record evidence concerning at least a half dozen migratory bird species that were identified on its property. The fact that the balefill site serves as a habitat to these birds is sufficient to establish agency jurisdiction.

Finally, plaintiff argues that it was unreasonable for the Corps to assert jurisdiction over the property in November of 1987 after it declined to do so in April of 1986 and March of 1987. As an preliminary matter, it is unclear that the agency actually reversed its position. The Corps initially declined to extend jurisdiction over the balefill site for the limited reason that the property did not contain any protected lakes or wetlands. This did not, strictly speaking, rule out the possibility that the property was a habitat for migratory birds.

Even if the Corps changed its position, however, it had sound reasons for doing so. See *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280, 284 (7th Cir.1986) (when an agency changes course, it must give sound reasons for doing so). The agency first learned in July of 1987 that the balefill site was a potential habitat for migratory birds, and it was certainly not obliged to discover that information at an earlier time. It then gathered a substantial volume of information about the topography and avifauna of the SWANCC property. Because all of this information was sufficient to establish agency jurisdiction, any change in the agency's position was not arbitrary. For all of these reasons, the court finds that it was reasonable for the Corps to determine that all of the waters of the SWANCC property were used as a habitat by migratory birds.

C. Clean Water Act

Plaintiff contends that the migratory bird rule goes beyond its statutory mandate because the Clean Water Act only authorizes federal regulations that deal strictly with water quality. The court must defer to an agency's interpretation of its own authorizing statute so long as that interpretation is reasonable and not in conflict with the expressed intent of Congress. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Accordingly, the court must decide whether it was reasonable for the Army Corps of Engineers to interpret the statutory term "waters of the United States" to include intrastate waters that provide a habitat for migratory birds.

The Seventh Circuit arguably resolved this question in *Hoffman Homes II*, 999 F.2d 256. The issue in that case, as defined by the court, was whether it was reasonable for the EPA to construe the term "other waters" in 40 C.F.R. §

230.3(s)(3) to include waters that serve as a habitat for migratory birds. *Id.* at 260. Although the court did not expressly consider whether the regulation was within the scope of the Clean Water Act, it arguably reached the issue by implication. Vacating an earlier decision in which it held that the regulation was beyond its statutory mandate, the court explained that the EPA's interpretation of the regulation was both reasonable and authorized by the commerce clause. *Id.* at 260-261. In light of the fact that the Clean Water Act extends federal jurisdiction to the limits of the commerce clause, this holding virtually implied that the migratory bird rule was consistent with its authorizing statute. *Id.* at 261. It is also apparent that the court could not have reached its decision in the case if the regulation at issue were illegal. Because the Seventh Circuit did not address the issue directly, however, the court will discuss it here.

Both the language and the legislative history of the Clean Water Act suggest that it authorizes the regulation of intrastate migratory bird habitats. The purpose of the statute is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In part, this is necessary to achieve "the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). Moreover, the statute authorizes the EPA to promulgate regulations in order to protect fish and wildlife. 33 U.S.C. § 1343(c)(1). To the extent that the actual language of the Clean Water Act reveals that Congress intended to protect wildlife, the migratory bird rule would appear to be a permissible construction of that statute.

The legislative history of the Clean Water Act leads to the same conclusion. That history reveals that Congress intended "to extend Clean Water Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause." S.Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972), U.S.C.C.A.N. 1972, at pp. 3668, 3776. The Seventh Circuit has long recognized that Congress intended

to make the Clean Water Act as far-reaching as the commerce clause permits. See *Rueth v. U.S. EPA*, 13 F.3d 227, 231 (7th Cir.1993); *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir.1985); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir.1979). To the extent that the commerce clause authorizes the federal government to regulate intrastate migratory bird habitats, then, the Clean Water Act must as well. For these reasons, the court finds that 33 C.F.R. § 328.3(a)(3), as applied to intrastate migratory bird habitats, is a reasonable construction of the Clean Water Act.

Notably, the Fourth Circuit reached the opposite conclusion in *United States v. Wilson*, 133 F.3d 251 (4th Cir.1997). In that case, the court explained that 33 C.F.R. § 328.3(a)(3) went beyond its statutory mandate because the term "waters of the United States" cannot include intrastate or nonnavigable waters whose degradation or destruction could affect interstate commerce. *Id.* at 256-257. Relying generally on the Supreme Court's decision in *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626, the majority explained that the phrase "waters of the United States" must refer "to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257. In a separate opinion, Judge Luttig declined to adopt this portion of the majority opinion on the grounds that it was based on an overly expansive reading of *Lopez*. *Id.* at 266.

This court respectfully declines to follow the majority in *Wilson*. Because the scope of federal regulatory jurisdiction under the Clean Water Act is coextensive with that of the commerce clause, and because the commerce clause authorizes the federal regulation of intrastate migratory bird habitats, the migratory bird rule must be a valid application of the Clean Water Act. For the reasons discussed in Part II.A. of this opinion, the court does not believe that *Lopez* requires a contrary result. On this point, then, the court agrees with the Ninth Circuit that "[t]he commerce clause

power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt II*, 896 F.2d at 360.

D. Administrative Procedure Act

Plaintiff argues that the migratory bird rule was promulgated without public notice and comment in violation of the APA. That statute requires federal agencies to provide notice and an opportunity for public comment before they promulgate or amend administrative regulations, but it creates an exception for interpretive rules and general statements of policy. 5 U.S.C. § 553. An interpretive rule is one in which an agency explains what a statute means or reminds parties of existing duties, while a substantive rule creates altogether new rights or duties. *Metropolitan School Dist. of Wayne Township v. Davila*, 969 F.2d 485, 489-90 (7th Cir.1992); *see also American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987). Because the parties agree that the migratory bird rule was adopted without notice and comment, the court need only decide whether the rule is substantive or interpretive.

This issue was addressed in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726, 728-729 (E.D. Va.1988). In that case, a landowner sought a declaratory judgment that his property was not subject to federal jurisdiction because it did not contain "other waters" as defined by 33 C.F.R. § 328.3(a)(3). *Id.* at 727. The Army Corps of Engineers argued that it had jurisdiction over the site pursuant to an internal memorandum which explained that the term "other waters" included those which "are used or could be used as habitat by other migratory birds which cross state lines." *Id.* at 728. The district court held that the memorandum was a substantive rule-making because it had a "significant effect on public interests" and was "intended to have the full force and effect of a substantive rule." *Id.* at 728-729. Accordingly,

the court held that the memorandum was adopted in violation of the notice and comment requirements of the APA and did not confer federal jurisdiction over the property in question. *Id.* at 729.

In an unpublished opinion, a divided panel of the Fourth Circuit affirmed this holding without explanation. See *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (4th Cir.1989) (per curiam) (text at 1989 WL 106990). In dissent, Judge Hall suggested that the district court had erred by considering the impact of the rule instead of limiting its analysis to the question of whether the memorandum created new rights or duties. *Id.* at *2 (Hall, J., dis.). He reasoned that the memorandum did not give rise to new law because the statutory term "waters of the United States" was intended to have "the broadest possible constitutional interpretation" under the commerce clause, and the memorandum simply identified "what contacts with interstate commerce are sufficient to bring a given wetland within the jurisdictional reach" of that statute. *Id.* at *3.

More recently, the Ninth Circuit discussed this question in *Leslie Salt IV*, 55 F.3d 1388. When the plaintiff first raised this issue on appeal in *Leslie Salt II*, 896 F.2d 354, the court declined to address it and thus held by implication that the rule was procedurally sound. 55 F.3d at 1393. When the court revisited the issue in *Leslie Salt IV*, its review was limited to the question of whether its prior holding was clearly erroneous. *Id.* at 1394. Relying on *Hoffman Homes II*, 999 F.2d at 261, where the Seventh Circuit held that the term "other waters" in both 40 C.F.R. § 230.3(s)(3) and 33 C.F.R. § 328.3(a)(3) could be read to include waters used by migratory birds, the Ninth Circuit reasoned by analogy that the migratory bird rule could be viewed as an interpretation of the Clean Water Act rather than a substantive rule-making. *Leslie Salt IV*, 55 F.3d at 1394. In a somewhat narrow holding, then, the court concluded that it was "plausible" to

construe the migratory bird rule as an interpretation of the Clean Water Act. *Id.*

It is the opinion of this court that the migratory bird rule is interpretive rather than substantive.[4] The Clean Water Act authorizes the EPA and the Army Corps of Engineers to exercise regulatory jurisdiction over the "waters of United States." 33 U.S.C. § 1362(7). Pursuant to this authority, the Army Corps of Engineers adopted a regulation in 1977 which defined the term "navigable waters" to include isolated intrastate waters whose "degradation or destruction could affect interstate commerce." 33 C.F.R. § 323.2(a)(5) (1977), 42 Fed.Reg. 37,144 (July 19, 1977). In 1986, the Corps renumbered this provision as 33 C.F.R. § 328.3(a)(3) but left the substance of the regulation largely unchanged. The "migratory bird rule" appears in the preamble to the 1986 version of the regulations. 51 Fed.Reg. 41,216 (November 13, 1986).

In the preamble, the Corps explained that the purpose of the reorganization was "to clarify the scope of the Section 404 permit program." 51 Fed.Reg. 41,216. Rather than change the existing definitions, it sought to clarify them by putting them in a separate and distinct part of the regulation. 51 Fed.Reg. 41,216-41,217. The agency then explained that the term "waters of the United States" includes those:

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[4] Defendant suggests that the Seventh Circuit addressed this question in *Hoffman Homes II*, 999 F.2d at 261. Although the issue was raised in one of the briefs in that case, the court opted not to address it. (Hearing 5/22/97 Tr. at 29.) Arguably, however, the court ruled on the matter by implication when it held that it was reasonable for the EPA to interpret the term "other waters" in 40 C.F.R. § 230.3(s)(3) to include those used as a habitat for migratory birds. *Hoffman Homes II*, 999 F.2d at 261; see also *Leslie Salt IV*, 55 F.3d at 1393. Because the Seventh Circuit did not offer a complete discussion of the question, however, the court will treat the issue as one of first impression in this circuit.

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endang[illegible]d species; or

d. Used to irrigate crops sold in interstate commerce.

51 Fed.Reg. 41,217. For additional clarification, the agency then listed five examples of waters that are not generally considered to be "waters of the United States." 51 Fed.Reg. 41,217. The agency emphasized that the reorganization was not intended to expand or retract the scope of agency jurisdiction, but rather "to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." 51 Fed.Reg. 41,217.

There are at least two reasons why the preamble was not a substantive rulemaking. First, the agency itself intended for the preamble to be interpretive. See *Davila*, 969 F.2d at 489 (characterization of a rule by an agency is relevant to whether it is substantive or interpretive). The agency expressly stated that it intended to clarify the scope of the existing section 404 permit program rather than to change existing definitions or to expand its jurisdiction. This is corroborated by the structure of the preamble, which sets forth the migratory bird rule in juxtaposition to a list of waters that are not generally considered to be subject to federal regulation.

More importantly, however, the migratory bird rule does not create new legal rights or duties, for it does not expand the jurisdictional reach of the Clean Water Act or the regulations promulgated thereunder. By authorizing the Army Corps of Engineers to regulate the "waters of the United States," the Clean Water Act extended the jurisdiction of these agencies to the outer limits of the commerce clause. *Rueth*, 13 F.3d at 231. Pursuant to this statutory authority,

the Army Corps of Engineers defined the term "navigable waters" to include all intrastate waters whose degradation or destruction could affect interstate commerce. 33 C.F.R. § 328.3(a)(3). In effect, this "catch-all" provision simply reiterates that the jurisdiction of the agency is coextensive with that of the commerce clause. Because the commerce clause permits the Corps to regulate intrastate migratory bird habitats, the bird rule cannot be said to increase the jurisdiction of that agency. Rather than creating new rights or duties, then, the preamble simply clarifies that the regulation of intrastate migratory bird habitats falls within the scope of the agency's commerce clause jurisdiction. Accordingly, the court finds that the migratory bird rule was not subject to the notice and comment requirements of the APA.

On this point, then, the court expressly declines to follow the reasoning of the district court in *Tabb Lakes*, 715 F.Supp. 726. The fact that the bird rule carries the "force and effect of a substantive rule" or has a "significant effect on public interests" does not, as the court in that case reasoned, imply that the rule creates new substantive rights or duties. *Id.* at 728-729. For the reasons described above, the court believes that the better position on this issue is represented by Judge Hall's dissenting opinion in *Tabb Lakes v. U.S.*, 885 F.2d 866 (4th Cir.1989) (per curiam) 1989 WL 106990, at *2 (Hall, J., dis.), and the Ninth Circuit's opinion in *Leslie Salt IV*, 55 F.3d 1388.

III. Conclusion

For the reasons stated above, the court finds that defendant Army Corps of Engineers did not exceed its authority under the commerce clause by extending regulatory jurisdiction over the waters of plaintiff's proposed balefill site pursuant to 33 C.F.R. § 328.3(a)(3); as applied in this case, 33 C.F.R. § 328.3(a)(3) does not exceed its mandate under the Clean Water Act; the extension of regulatory jurisdiction

over the proposed balefill Site was not arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A); and the migratory bird rule set forth at 51 Fed.Reg. 41,217 was exempt from the notice and comment requirements of the APA, 5 U.S.C. § 553.

ORDERED: Defendant's motion for summary judgment is granted; plaintiff's motion for summary judgment is denied.

33 U.S.C. § 1344 Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

33 C.F.R. § 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

* * *

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

* * *

51 Fed. Reg. 41206

RULES AND REGULATIONS

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

Thursday, November 13, 1986

* * *

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

* * *

Supreme Court, U.S.
FILED
MAR 15 2000
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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers may, consistent with the Clean Water Act and the Commerce Clause, exercise regulatory jurisdiction over a series of permanent and seasonal ponds and small lakes that are used as habitat for numerous species of migratory birds.

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In the Supreme Court of the United States

No. 99-1178

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. Justice Stevens granted an extension of time to and including January 14, 2000, for filing a petition for a writ of certiorari, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act (Clean Water Act or CWA) in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the chief goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The Corps' original regulations limited the geographic scope of the Corps' authority to waters that were navigable-in-fact. After that narrow interpretation was rejected

by the courts,[1] the Corps issued interim final regulations in 1975, see 40 Fed. Reg. 31,320, and final regulations in 1977, see 42 Fed. Reg. 37,122. The final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[2] The regulation in its current form contains similar language. See 33 C.F.R. 328.3(a)(3).[3] Regulations promulgated by the Environmental Protection Agency (EPA) include a substantially identical

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[1] See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). Shortly after the decision in *Holland*, the House Committee on Government Operations expressed the view that the Corps' regulatory definition of "waters of the United States" was unduly narrow. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that the term be given the broadest possible constitutional interpretation." *Id.* at 27.

[2] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

[3] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the EPA had "clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. a. Petitioner Solid Waste Agency of Northern Cook County is a consortium of Illinois municipalities formed for the purpose of locating and developing a disposal site for nonhazardous waste. Pet. App. 1a-2a. Petitioner owned a 533-acre parcel of land in Cook and Kane Counties, Illinois, on which it proposed to locate a solid waste landfill. *Ibid.* The project site was 410 acres in size, 298 acres of which was an "early successional stage forest." *Id.* at 2a. Over time, "[w]hat were once gravel pits" have evolved into "over 200 permanent and seasonal ponds * * * rang[ing] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.*

Approximately 121 species of birds have been observed on the project site, including species that "depend on aquatic environments for a significant

portion of their life requirements" and "migrate through portions of the United States." C.A. App. 90. "Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons.' Pet. App. 3a. Each of the above-listed species is on the list of migratory bird species protected under international treaties. See 50 C.F.R. 10.13. "[T]he site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Pet. App. 3a.

b. Petitioner's proposed balefill would involve the filling of approximately 17.6 acres of the ponds and small lakes on its property. Pet. App. 3a, 15a. The Corps ultimately concluded that the ponds are "waters of the United States" falling within its regulatory jurisdiction under 33 C.F.R. 328.3(a)(3) because (*inter alia*) "the water areas are used as habitat by migratory birds[s] which cross state lines." C.A. App. 90; see also Pet. App. 3a-4a, 15a-16a. Petitioner subsequently applied to the Corps for a permit under Section 404 of the CWA, 33 U.S.C. 1344. C.A. App. 85-86; Pet. App. 4a, 16a. After an extensive public review process and input from numerous local, state, and federal agencies, the Corps denied the permit in July 1994. C.A. App. 84-171; Pet. App. 4a, 16a. The Corps based the permit denial on the agency's findings that (*inter alia*) (1) the landfill would seriously degrade or eliminate the value of the area as habitat for numerous species of birds and other wildlife (C.A. App. 155-157); (2) petitioner had failed to demonstrate that there were no practicable alternatives to the proposed landfill that would be less environmentally damaging (*id.* at 170); and (3) the

project posed "an unacceptable risk to the public's drinking water supply," due to the possibility that leachate from the landfill could contaminate groundwater aquifers (*id.* at 171).

3. Petitioner filed suit in federal district court, seeking judicial review of the Corps' decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 14a. Petitioner challenged both the Corps' assertion of regulatory jurisdiction over its property and the merits of the permit denial. *Id.* at 1a. The district court granted summary judgment for the government on the issue of CWA jurisdiction. *Id.* at 14a-36a. Petitioner then consented to the dismissal with prejudice of its remaining claims, and the district court entered final judgment in favor of the government. *Id.* at 2a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court observed that petitioner had "abandoned its challenge to the merits of the Corps' decisions and ha[d] instead focused exclusively on its challenge to" the Corps' assertion of regulatory jurisdiction over the property based on the presence of migratory birds. *Id.* at 4a. The court therefore "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

a. The court of appeals rejected petitioner's contention that "Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone." Pet. App. 5a. Prior to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the court explained, "it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of

migratory birds." Pet. App. 5a (citing cases). The court found that *Lopez* had not undermined that rule. It observed that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a. The court summarized statistical evidence showing that Americans engage in frequent interstate travel and spend substantial sums of money in order to hunt and observe migratory birds. *Id.* at 7a. It concluded that

> the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Ibid. The court also stated that "the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds," refuted petitioner's contention that the protection of migratory bird habitat is a matter of purely local concern. *Id.* at 8a (quoting *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983)).

b. The court of appeals rejected petitioner's argument that the Corps' exercise of regulatory jurisdiction over the ponds in question exceeded its authority under the CWA. The court observed that the construction of the statutory term "waters of the United States"

utilized by the Corps and EPA is entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Ibid.* (citing cases). It concluded that, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner." *Id.* at 10a.

c. The court of appeals rejected petitioner's contention that the Corps' exercise of regulatory jurisdiction in this case was inconsistent with *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). *Wilson* involved a challenge to 33 C.F.R. 328.3(a)(3), which defines "waters of the United States" to include all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." The court of appeals in the instant case explained that the *Wilson* court "found the regulation to be an unreasonable interpretation of the [CWA] based on its suspicion that Congress lacks the power to regulate waters that 'could' affect interstate or foreign commerce." Pet. App. 10a. The court of appeals stated that in the present case,

> the question whether Congress may regulate waters based on their *potential* to affect interstate commerce is not presented, because the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats.

Ibid.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends that the decision of the court of appeals conflicts with the ruling of the Fourth Circuit in *United States* v. *Wilson*, 133 F.3d 251 (1997). That claim is incorrect.

a. *Wilson* was a criminal case in which the defendants were convicted of knowingly discharging dredged or fill material into waters of the United States without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). See 133 F.3d at 254. With respect to the jurisdictional element of the CWA, the jury was instructed that "[t]he government must prove that these waters have some potential connection with interstate commerce." *Id.* at 256.[4] The district court based that instruction on the regulatory definition of "waters of the United States" contained in 33 C.F.R. 328.3(a)(3), which encompasses "[a]ll other waters such as intrastate * * * wetlands * * * or natural ponds, the use,

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[4] The jury instructions further explained that the wetlands at issue would be considered "waters of the United States" if the jury found "that these waters were *or could be* used by visitors from other states for recreational or other purposes"; "that fish or shellfish are *or could be* taken from these waters and sold in interstate or foreign commerce"; "that these waters were used *or could have been used* for industrial purposes by industries in interstate commerce"; or "that the use, degradation or [destruction] of such waters *could* affect interstate commerce." 133 F.3d at 256 (emphasis added).

degradation or destruction of which could affect interstate or foreign commerce." The defendants argued that "the regulation and jury instructions [we]re fatally flawed * * * because of their invocation of 'potential' uses and effects on commerce." 133 F.3d at 256.

The *Wilson* court reversed the convictions and remanded for a new trial. It stated that 33 C.F.R. 328.3(a)(3) permits the exercise of CWA jurisdiction over waters "solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." 133 F.3d at 257. The court concluded that the Corps had exceeded its authority under the CWA by defining the term "waters of the United States" in that manner, and that the jury instructions based upon the regulation were therefore erroneous. *Ibid.*[5]

b. Although the decision in *Wilson* is in some tension with the court of appeals' ruling in this case, no square conflict exists. The *Wilson* court held that the Corps had exceeded its authority by asserting jurisdiction over all waters the use, degradation, or destruction of which could potentially affect interstate commerce. The court did not attempt to describe the sorts of connections to interstate commerce that would suffice to bring a particular body of water within the CWA's coverage. See 133 F.3d at 256 ("we need not resolve these difficult questions about the extent and limits of

[5] The *Wilson* court reversed the defendants' convictions on an additional, independent ground, holding that the district court had erroneously instructed the jury on the mental state requirements of the offense. 133 F.3d at 260-265.

congressional power to regulate nonnavigable waters to resolve the issue before us"). The *Wilson* court did not, in particular, address the question "whether the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce." Pet. App. 7a.[6] Thus, nothing in *Wilson* purports to resolve the question whether use of a

[6] The *Wilson* court stated that 33 C.F.R. 328.3(a)(3) was defective, in part, because it does not require "that the regulated activity have a *substantial* effect on interstate commerce." 133 F.3d at 257. The court did not say, however, that each individual instance of the regulated activity must substantially affect interstate commerce. The Fourth Circuit has since clarified its views on this point in *Brzonkala* v. *Virginia Polytechnic Institute & State University*, 169 F.3d 820 (4th Cir. 1999) (en banc), cert. granted, Nos. 99-5 & 99-29 (argued Jan. 11, 2000). There the court recognized that Congress may regulate "activities that arise out of or are connected with a commercial transaction, which *viewed in the aggregate*, substantially affects interstate commerce." *Id.* at 831 (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)) (emphasis added). See also 169 F.3d at 831 (acknowledging that federal regulations may "include a jurisdictional element to ensure, 'through case-by-case inquiry,' that each specific application of the regulation involves activity that in fact affects interstate commerce") (quoting *Lopez*, 514 U.S. at 561); 169 F.3d at 836. Cf. *United States* v. *Nathan*, 202 F.3d 230 (4th Cir. 2000) (rejecting argument that government must prove a "substantial effect" on interstate commerce in every prosecution of a felon for possession of a firearm under 18 U.S.C. 922(g) (1994 & Supp. IV 1998)).

The court of appeals in *Brzonkala* went on (incorrectly, in our view) to hold that the aggregate effects principle is generally limited to regulation of activities that are "economic" or "commercial" in nature (169 F.3d at 834-836) or at least have some "meaningful connection with a[] particular, identifiable economic enterprise or transaction" (*id.* at 834). Petitioner's proposal to construct and operate a municipal solid waste landfill, however, is clearly an economic activity. Cf. *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389 (1994).

particular body of water as habitat for migratory birds is sufficient to bring the water within the Corps' jurisdiction under the CWA.[7]

Finally, petitioner argues (Pet. 11) that its ponds cannot be "waters of the United States" under the Fourth Circuit's view of the CWA because they have "no connection to navigable or interstate waters or waters closely related thereto." Petitioner refers (Pet. 10) to the suggestion in *Wilson* that, "[e]ven as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." 133 F.3d at 257. That statement, however, is merely *dictum* and does not constitute an "alternative" holding (Pet. 11).

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[7] Petitioner contends (Pet. 10) that because the so-called "migratory bird rule" is an "*interpretation* or *clarification*" of Section 328.3(a)(3), the *Wilson* court's determination that the regulation is invalid necessarily implies that the "migratory bird rule" is invalid as well. That is a non sequitur. The 1986 *Federal Register* notice (see p. 4, *supra*) identified waters "[w]hich are or would be used as habitat by" migratory birds as an example of waters that would fall within the Corps' conception of "waters of the United States." The *Wilson* court's holding that the regulatory definition sweeps too broadly does not logically suggest that this (or any) particular category of waters falls outside the Corps' statutory jurisdiction. As the court of appeals in the instant case observed, moreover, "the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a. The question whether the Corps may properly assert "jurisdiction over areas that are only potential habitats" therefore is not presented in this case. *Ibid.*

c. The lower courts that have specifically considered the question have uniformly upheld the Corps' authority to regulate isolated waters that serve as habitat for migratory birds. See *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 360 (9th Cir. 1990) (*Leslie Salt I*) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species"), cert. denied, 498 U.S. 1126 (1991); *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1394-1396 (9th Cir.) (*Leslie Salt II*) (adhering to *Leslie Salt I* in a post-*Lopez* decision, under law of the case doctrine), cert. denied, 516 U.S. 955 (1995); see also *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (evidence that "lake is on the flyway of several species of migratory waterfowl" supports jurisdiction over isolated lake under CWA and Commerce Clause); *United States* v. *Hallmark Constr. Co.*, 14 F. Supp. 2d 1069, 1075 (N.D. Ill. 1998); *United States* v. *Sargent County Water Resource Dist.*, 876 F. Supp. 1081, 1087 (D.N.D. 1992).

2. The court of appeals' decision is correct.

a. Petitioner contends (Pet. 17) that because Section 404 of the CWA uses the term "navigable waters," 33 U.S.C. 1344(a), the Corps' jurisdiction must be strictly limited to those waters that are "navigable in fact," "interstate," or "closely related to navigable or interstate waters." That argument is without merit. Congress defined the term "navigable waters" broadly to include, without qualification, "the waters of the United States." 33 U.S.C. 1362(7). Because the CWA does not further define the term "waters of the United States," the administrative construction given that term by the Corps and EPA is "entitled to deference if it is reasonable and not in conflict with the expressed intent of

Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

In *Riverside Bayview*, this Court upheld as reasonable the Corps' interpretation of "waters of the United States" to encompass "wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. at 123.[8] The Court explained that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133; see also *ibid.* ("Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").

Petitioner's view is not only unsupported by the text, it is also antithetical to the purposes of the statute. The focus of the CWA is not on navigation, but on "maintaining and improving water quality" and "[p]rotect[ing] aquatic ecosystems." *Riverside Bayview*, 474 U.S. at 132; see also *id.* at 133 (noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"); 33 U.S.C. 1251(a) and (a)(2) (goals of the CWA include "restor-[ing] and maintain[ing] the * * * biological integrity of the Nation's waters" and "provid[ing] for the protection and propagation of fish, shellfish, and wildlife"). Isolated waters, such as those on petitioner's property, may "function as integral parts of the aquatic environment," and may "serve significant natural biological

[8] The Court noted that regulatory jurisdiction over nonadjacent wetlands was not at issue in that case. *Riverside Bayview*, 474 U.S. at 124 n.2.

functions," including "food chain production" and the provision of "general habitat[] and nesting, spawning, rearing and resting sites," even though they are intrastate and nonnavigable. *Riverside Bayview*, 474 U.S. at 134-135 (quoting 33 C.F.R. 320.4(b)(2)(i)).[9]

b. Contrary to petitioner's assertions (Pet. 19-22), the Corps' interpretation of the CWA is supported rather than undermined by the Act's legislative history. The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency

[9] The courts of appeals (including the Fourth Circuit) have uniformly recognized that Congress intended the geographical scope of the CWA to extend to the maximum extent permissible under the Commerce Clause. See, *e.g.*, *United States* v. *Tull*, 769 F.2d 182, 184 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Hartsell*, 127 F.3d 343, 348 & n.1 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-915 (5th Cir. 1983); *Leslie Salt I*, 896 F.2d at 357; *Quivira Mining Co.* v. *EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *United States* v. *Eidson*, 108 F.3d 1336, 1341 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997). But cf. *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 965-966 (7th Cir.) ("waters of the United States" does not cover groundwater), cert. denied, 513 U.S. 930 (1994). Petitioner cites no case holding that the term "waters of the United States" is limited to waters that are "closely related" to navigable or interstate waters. Petitioner's reliance (Pet. 17) on *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), is misplaced. Those cases, which significantly predate the CWA, construed the term "*navigable* waters of the United States." *The Daniel Ball*, 77 U.S. (10 Wall.) at 562 (emphasis added); *The Montello*, 87 U.S. (20 Wall.) at 436, 439 (emphasis added).

determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). That understanding was confirmed in the Senate Report accompanying the 1977 amendments to the CWA. See S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977) (noting that "[t]he 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent").

The debates preceding the 1977 amendments to the CWA further support the Corps' interpretation of the Act. Congress was well aware that the Corps' regulations, promulgated July 19, 1977, asserted jurisdiction over all waters, including isolated waters, to the maximum extent constitutionally permissible. See, *e.g.*, 123 Cong. Rec. 26,711 (Sen. Bentsen) (warning that if the CWA were not amended, "[t]he [Section 404] program would still cover all waters of the United States, including small streams, ponds, [and] isolated marshes"); *id.* at 34,852 (Rep. Abdnor) (explaining that the Corps was asserting jurisdiction over "all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes"). Congress considered, but ultimately rejected, several proposals to modify the Corps' geographic jurisdiction, instead opting to exempt certain types of activities from the Section 404 permit requirement. See 33 U.S.C. 1344(f). In the words of Senator Baker, the 1977 amendments "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [CWA] to control pollution to the fullest constitutional extent." 123 Cong. Rec. at 39,209. In sum, Congress "acquiesced in the administrative construction." *Riverside Bayview*, 474 U.S. at 136. Congress's refusal to divest the Corps of jurisdiction

over isolated waters is evidence of the reasonableness of the Corps' approach, "particularly where the administrative construction [was] brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137; see generally *id.* at 135-137 (recounting history of 1977 amendments).[10]

c. Petitioner contends (Pet. 22) that "no deference" is owed to the migratory bird rule "because it raises serious constitutional concerns" under the Commerce Clause. To the contrary, the application of the migratory bird rule in this case fits comfortably within Congress's commerce power.

i. "Congress' commerce authority includes the power to regulate those [intrastate] activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-559. The requirement of a "substantial" effect on interstate commerce, however, does not mean that each individual instance of the regulated activity must have a substantial impact. Rather, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 558 (emphasis omitted) (quoting

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[10] Petitioner argues (Pet. 21) that the legislative history of the 1977 CWA amendments is irrelevant because the Corps' 1977 regulations did not specifically cite waters that are used by migratory birds as an example of waters that possess the requisite connection with interstate commerce. The Corps' 1977 regulations referred, however, to "all" "isolated * * * waters that are not part of a tributary system to interstate waters or to navigable waters * * *, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. at 37,144. Thus, Congress clearly understood that the Corps would assert CWA jurisdiction over isolated waters for which *any* legitimate commerce nexus could be established.

Maryland v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). The aggregate effects of the regulated activity as a class—here, the filling of isolated waters that are actually used as habitat for migratory birds—may therefore be considered in determining whether the statute falls within the reach of Congress's commerce power. 514 U.S. at 561.

The permit denial in the instant case was based in part on the Corps' extensive factual findings (unchallenged by petitioners on appeal, see Pet. App. 5a) regarding the adverse impacts that petitioner's proposed balefill would have on the quantity and quality of migratory bird habitat on the site (C.A. App. 155-157, C.A. Supp. App. 32-40). Those impacts included, *inter alia*, the "displace[ment of] the [Great Blue Heron] rookery in its entirety." C.A. Supp. App. 37. Prevention of such threats has long been recognized to be a matter of national concern. See, *e.g.*, *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920)); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Cochrane* v. *United States*, 92 F.2d 623, 626-627 (7th Cir. 1937), cert. denied, 303 U.S. 636 (1938); *Cerritos Gun Club* v. *Hall*, 96 F.2d 620 (9th Cir. 1938).

Commerce associated with migratory birds has a measurable impact on the national economy. See *Hoffman Homes, Inc.* v. *United States Environmental Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) ("Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds."). As the court of appeals observed,

> [s]tatistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons.

Pet. App. 7a (citation omitted). The filling of wetlands and similar aquatic areas that serve as migratory bird habitat directly affects the ability of people to pursue recreational and commercial activities associated with migratory birds. See *Hoffman Homes*, 999 F.2d at 261 (noting that "cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); see also C.A. Supp. App. 33 (Corps finding in this case that "[m]uch of the current severe drop in area sensitive bird populations is blamed on habitat destruction").[11]

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[11] Congress has repeatedly recognized the importance of preserving migratory bird habitat to the viability of migratory bird populations. See, *e.g.*, North American Wetlands Conservation Act, 16 U.S.C. 4401(a)(8) (finding that nationwide loss of wetlands has "contributed to long-term downward trends in populations of migratory bird species"); Water Bank Act, 16 U.S.C. 1301 (declaring it "in the public interest to preserve, restore, and improve the wetlands of the Nation * * * to preserve and improve habitat for migratory waterfowl"); Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901(a)(2) (finding that "wetlands provide habitat

ii. Petitioner argues (Pet. 26) that the statutory term "waters of the United States" should be construed narrowly under the canon of construction that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court has recognized, however, that Congress may authorize "an administrative board or agency to determine whether the activities sought to be regulated or prohibited have" such an effect on interstate commerce as to justify federal regulation. *United States* v. *Darby*, 312 U.S. 100, 120 (1941). By broadly extending the CWA to "the waters of the United States," Congress expressed its intent that the Corps and EPA would exercise their regulatory jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause. See pp. 2-4, *supra*. Petitioner's interpretive approach—which would limit the Act's coverage to categories of waters having the "'clearest indication' of congressional support" (Pet. 26)—would substantially constrain the agencies' discretion in a manner "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

d. Contrary to petitioner's contention (Pet. 27-28), the Corps' assertion of regulatory jurisdiction over isolated waters that serve as habitat for migratory birds does not disrupt the federal-state balance or impermissibly impinge on the authority of state and local governments. Petitioner's argument assumes that

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essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of * * * migratory birds").

the protection of migratory bird habitat is a matter of purely local concern. As the court of appeals explained, that proposition is inconsistent with "the numerous international treaties and conventions designed to protect migratory birds," Pet. App. 8a (citing examples), as well as with prior decisions of this Court, *ibid.*; see p. 18, *supra*. Congress has repeatedly recognized that wetlands and similar aquatic areas are a *national* resource and that wetlands loss is a problem national in scope. See, *e.g.*, 16 U.S.C. 3901(a) and (b) (declaring national goal to conserve remaining wetland resources for benefit of "all our citizens of the Nation" and to "help fulfill international obligations contained in various migratory bird treaties and conventions").

3. This Court recently granted certiorari in three other cases that present questions concerning the scope of congressional authority under the Commerce Clause. *United States* v. *Morrison*, No. 99-5 (argued Jan. 11, 2000), and *Brzonkala* v. *Morrison*, No. 99-29 (argued Jan. 11, 2000), present the question whether 42 U.S.C. 13981, which creates a private right of action for victims of gender motivated violence, is a permissible exercise of Congress's power under the Commerce Clause. *Jones* v. *United States*, No. 99-5739 (to be argued Mar. 21, 2000), presents the question whether 18 U.S.C. 844(i) (1994 & Supp. IV 1998), which prohibits the destruction by fire or explosives of any building, vehicle, or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a residence mortgaged to an out-of-state lender, insured by an out-of-state insurer, and supplied with natural gas in interstate commerce. In our view, those statutory schemes are sufficiently different from the CWA that the Court's decisions in those cases are unlikely to affect

the proper disposition of the instant case. However, the Court may wish to hold the petition for a writ of certiorari in the instant case pending its decisions in the above-listed cases, and then dispose of the petition accordingly.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decisions in *United States* v. *Morrison*, No. 99-5 (argued Jan. 11, 2000); *Brzonkala* v. *Morrison*, No. 99-29 (argued Jan. 11, 2000); and *Jones* v. *United States*, No. 99-5739 (to be argued Mar. 21, 2000), and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

The issue in this case is whether the Corps of Engineers runs afoul of the Commerce Clause and the Clean Water Act when it claims authority to prohibit a municipal corporation from filling isolated waters on its land—a necessary incident to creating a long-planned and urgently required public waste disposal project—solely because those waters "are used as habitat by migratory bird[s] which cross state lines" or are protected by migratory bird treaties. Pet. C.A. App. 78; see Pet. 6 n.3.[1] The Corps' head-in-the-sand approach to the serious federalism concerns raised by its intrusion into a $20 million municipal project that had obtained every necessary state and local approval, as well as its strained defense of its reading of the CWA, confirm the need for immediate review. Four *amicus* briefs urging this Court to grant certiorari—filed by the National Association of Home Builders, the American Farm Bureau Federation, Cargill, Inc., and the Pacific Legal Foundation—attest to the importance of the question presented.

1. *The decision below conflicts with the Fourth Circuit's ruling in Wilson.* The Corps ignores the array of individual opinions and legal scholarship

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[1] The Solicitor General (at 5) tries to hint with citationless *"inter alias"* that there might have been some basis other than the migratory bird rule for asserting federal jurisdiction over the depressions and trenches on SWANCC's land. He identifies none in his brief in opposition, the Corps identified none to the courts below, and the Corps articulated none in its Section 404 denials.

explaining why the migratory bird rule violates the Commerce Clause and CWA. See Pet. 13-14 & n.5. It does admit (at 10) that "*Wilson* is in some tension with the court of appeals' ruling in this case." But that is an understatement. The Fourth Circuit would have decided this case differently. It held in *Wilson* that the "other waters" rule, 33 CFR § 328.3(a)(3), "is unauthorized by the [CWA] as limited by the Commerce Clause and therefore is invalid." 133 F.3d at 254. The bird rule purports to "clarif[y]" that invalidated regulation (see Pet. App. 40a) and falls with it. Even apart from *Wilson*, the Corps may not rely on the migratory bird rule in the Fourth Circuit. It was invalidated in *Tabb Lakes Ltd.* v. *United States*, 885 F.2d 866 (4th Cir. 1989) (per cur.), for APA violations that the Corps has never rectified. Pet. 4 & n.2.

The Fourth Circuit's critique of the "other waters" rule applies with equal force to the migratory bird rule. First, the court invalidated § 328.3(a)(3) because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." 133 F.3d at 257. The migratory bird rule likewise does not mention interstate commerce, requiring only that isolated waters "are or would be used as habitat by birds protected by Migratory Bird Treaties" or "which cross state lines." Pet. App. 40a. And the Corps made no finding that bird use of SWANCC's property implicated interstate commerce in any way, nor could it plausibly do so.

Second, "as a matter of statutory construction," the Fourth Circuit held, "'waters of the United States'

when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters" (133 F.3d at 257)—something that the "other waters" and migratory bird rules fail to recognize. Unlike the Corps (at 12), we see no sign that this interpretation of the CWA "is merely *dictum*." To the contrary, the quoted language introduces this clear holding: "When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3), which defines 'waters of the United States' to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definitional limit." As one commentator observed, "the *Solid Waste Agency* court reached the opposite conclusion regarding congressional intent from the *Wilson* court," and it was the "Fourth Circuit [that applied] the proper analysis." Challis, *Standing Alone in Murky Waters*, 34 WAKE FOREST L. REV. 1179, 1187 n.75, 1204 (1999).

2. *Other factors also make review timely.* The use of many millions of acres of land and tens of millions of isolated waters is directly and significantly affected by the bird rule. See NAHB Br. 4; AFBF Br. 7. Yet, as the Pacific Legal Foundation explains in its *amicus* submission (at 9-14), the rule has rarely been challenged in court because the Corps routinely denies landowners "final decisions" on their permit applications and thereby precludes litigation. The Corps' recent institution of new administrative exhaustion requirements makes it even less likely that a challenge like this will be ripened in the future. See *id.* at 14; 33 CFR

§§ 320.1(a)(2), 331.1-.12 (1999). This Court's opportunities to address the bird rule are rare; it should not pass this one up.

Moreover, the intolerable uncertainty that the bird rule creates for landowners is not solely a result of conflicting circuit precedent and different views of *Lopez*; it inheres in the itinerant nature of migratory birds. One year's habitat may be abandoned the next; the bird's arrival on particular land is unpredictable. Because of the bird rule, virtually every major land-use project is in jeopardy throughout its planning and construction. At any point, a migratory bird may arrive at a wet spot, creating Corps jurisdiction and triggering Section 404 permit requirements. A rule imposing such heavy burdens so unpredictably requires clear justification—not statutory and constitutional contortions like those on display in the Corps' brief.

3. *The CWA does not authorize the Corps to regulate SWANCC's property.* We have already refuted (at Pet. 16-22) the Corps' argument, repeated in its brief in opposition, that the CWA authorizes it to regulate waters that are not navigable, potentially navigable, or in any way connected or related to navigable waters. The language and legislative history of the CWA demonstrate that the Corps' interpretation is untenable. The Corps misreads *Riverside Bayview Homes* (see Pet. 17-18, 21), and it does not even deign to cite *Federal Power Commission* or discuss the Federal Power Act provisions interpreted in that case, though these are directly at odds with the Corps' position. See Pet. 19 & n.6.

Astonishingly, the Corps (at 15 n.9) dismisses as irrelevant *The Daniel Ball* and other cases discussed in our petition on the grounds that they "significantly predate the CWA" and "construed the term '*navigable* waters of the United States.'" We have shown, however (at Pet. 20-21), that Congress expressly referenced this Court's decisions interpreting the term "navigable waters of the United States" when it adopted the CWA, that those decisions were an important backdrop to the statute, and that they must inform its interpretation. By using the term "navigable waters" and defining them as "waters of the United States," Congress tapped into this Court's precedents. It rejected the narrowest interpretation of navigability, set forth in *The Daniel Ball*, in favor of the broader interpretation embraced by this Court in *United States* v. *Utah* and *Appalachian Electric*, which includes waters capable of being made navigable. Add together *Utah*, *Appalachian Electric*, and *Riverside Bayview Homes* and you have a statute that indeed reaches "*some* waters that would not be deemed 'navigable' under the classical understanding" (474 U.S. at 133)—but nothing like the wet trenches and depressions, totally devoid of any connection to navigable or interstate waters, that the bird rule subjects to federal control. See Pet. 16-21.[2]

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[2] Oddly, at the same time the Corps insists that navigability is irrelevant to its powers, it relies (at 15-16) on the statement in the Conference Report that "[t]he conferees fully intend that the term *'navigable waters'* be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144. The Corps does not

The Corps' contention (at 14-15) that its bird rule is authorized because the CWA regulates waters in part to protect wildlife proves far too much. If protection of wildlife were sufficient for CWA jurisdiction, no bird-bath or ornamental pond would be safe from federal regulation. Equally, no swimming pool would be beyond the Corps' authority, because another goal of the CWA is to protect waters for their recreational value. See 33 U.S.C. § 1251(a)(2). "[W]e must be guided to a degree by common sense" in interpreting a statute, and common sense dictates that the CWA's goals may properly be pursued only through regulation of waters with *some* real connection to the navigable waters of the United States. *FDA* v. *Brown & Williamson Tobacco Corp.*, Slip op. 10 (Mar. 21, 2000). "[A]n administrative agency's power to regulate * * * must always be grounded in a valid grant of authority from Congress." *Id.* at 39. A basis for the Corps' assertion of jurisdiction over tens of millions of puddles and ponds on private land cannot remotely be located in the CWA.

4. *The bird rule is not entitled to Chevron deference because it raises serious Commerce Clause concerns.* The Corps' citation (at 20) to *United States* v. *Darby*, 312 U.S. 100 (1941), does not support its claimed

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respond to our explanation that Congress thereby meant merely to choose the *Utah* and *Appalachian Electric* approach over that of *The Daniel Ball*. Nor does the Corps provide any reasoned way to get from the Conference Report statement about *navigable* waters to the Seventh Circuit's broad holding that the CWA "reaches as many *waters* as the Commerce Clause allows." Pet. App. 9a.

entitlement to *Chevron* deference. As this Court held in *Edward J. DeBartolo Corp.*, 485 U.S. at 574-577, an agency's statutory construction is entitled to *no* deference when it raises "serious constitutional concerns." See *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999) ("a court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts"); *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (in light of court's "oblig[ation] to construe the statute to avoid constitutional difficulties," agency was "not entitled to *Chevron* deference"). Nothing in *Darby* requires this Court, contrary to *DeBartolo*, to defer to the Corps' constitutionally dubious expansion of its own reach under the CWA. Even if Congress had authority under the commerce power to enact the migratory bird rule, after making appropriate legislative findings, a mere agency does not. See *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974).

The Corps pretends (at 17-18) that exercising jurisdiction over SWANCC's property based on the bird rule "fits comfortably" within federal commerce power because "[c]ommerce associated with migratory birds has a measurable impact on the national economy," and because the "aggregate effects" of filling "isolated waters that are actually used as habitat for migratory birds" have a "substantial impact" on this commerce. That argument is wrong.

The self-propelled flight of birds across state lines is not commercial in character. Like "any conduct in this interdependent world of ours," such flight may have "an ultimate commercial * * * consequence." *Lopez*, 514 U.S. at 580 (Kennedy and O'Connor, JJ., concurring). But any "commercial nexus" here is too strained to support the Corps' "intru[sion] upon an area of [such] traditional state concern" as land use planning and control. *Ibid.* "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed." *Id.* at 583. If the federal government can justify regulating every place and every thing used by migratory birds merely by pointing in a generalized way to expenditures by hunters and birdwatchers, then we have "obliterate[d] the distinction between what is national and what is local and create[d] a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

Beyond that, the Corps points to no statistics or other evidence, and has made no finding, that filling even *every single isolated water* would have a substantial effect on interstate birdwatching or hunting or on migratory bird populations. In looking at "aggregate effects" on interstate commerce, the Corps (at 18-19) aggregates the wrong thing: the filling of all types of waters used by migratory birds, instead of the filling of *isolated* waters so used. See Pet. 24 n.8.

Any impact that *isolated* waters have on interstate commerce, even in the national aggregate, is "relatively trivial" and cannot serve "as an excuse for

broad general regulation of state or private activities." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968). Filling wholly isolated waters is not an "activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567; see also *id.* at 560 ("*Wickard* * * * involved economic activity in a way that [filling isolated depressions and trenches] does not").[3]

5. *The bird rule infringes traditional state and local powers.* Based on its own view of the "public interest" (33 CFR § 320.4(a)), the Corps has blocked a state- and locally-approved project designed to benefit 700,000 residents of SWANCC's 23 member municipalities. The Corps' glib response (at 20-21) to our complaint that this infringes on local land use authority displays its cavalier approach to the Constitution's federalism guarantees as it seeks to aggrandize its own powers.

"[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961)

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[3] The Corps' frequent references to migratory bird treaties are unavailing. Of course, the treaty power authorizes the United States to agree with other nations to afford protection to migratory birds. But the Corps does not identify any treaty that requires the federal government to prevent the filling of isolated waters. Nor does it contend that the United States would be unable to fulfil its treaty obligations while also respecting the limits of its commerce power.

(Madison), quoted in *Printz*, 521 U.S. at 920-921. Requiring SWANCC to apply for a Section 404 permit in this case was an "ac[t] of usurpation" of local powers, which "deserve[s] to be treated as such." THE FEDERALIST NO. 33, at 204 (A. Hamilton). Contrary to the Corps' suggestion (at 21), Congress has *never* designated *isolated* waters as a national resource requiring national management. Absent an explicit determination of that sort, the CWA may not be read to "alter sensitive federal-state relationships" with regard to matters so "traditionally subject to state regulation" (*Rewis*, 401 U.S. at 811-812) as "the authority of state and local governments to engage in land use planning." *Dolan*, 512 U.S. at 384.

CONCLUSION

As the Solicitor General observes (at 21-22), the statutory schemes at issue in *Jones*, *Brzonkala*, and *Morrison* "are sufficiently different from the CWA that the Court's decisions in those cases are unlikely to affect the proper disposition" here. SWANCC's petition should not be held but granted forthwith, for the reasons stated above and in the petition.

Respectfully submitted.

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No. 99-1178

In the

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RANDY PETERSON IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and Randy Peterson respectfully submit this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amici participation in this case was granted by counsel of record for Petitioner and Respondent United States Army Corps of Engineers. Consent was withheld by Intervenor-Respondent City of Bartlett.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the Commerce Clause, statutory interpretation, administrative law, and other matters. For example, PLF participated as amicus curiae in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in several cases, including *Jones v. United States*, *cert. granted*, 120 S. Ct. 494 (1999), *Public Lands Council v. Babbitt*, *cert. granted*,

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

120 S. Ct. 320 (1999), *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, *cert. granted*, 119 S. Ct. 1495 (1999), and *United States v. Morrison, consolidated with Brzonkala v. Morrison, cert. granted*, 120 S. Ct. 11 (1999).

PLF seeks to augment the arguments of Petitioners by providing additional background on the regulatory scheme under which the Respondent federal agency is operating. PLF believes its public policy perspective and litigation experience dealing with the issues involved will provide a unique viewpoint on the issues presented in this case. PLF believes this viewpoint will aid this Court in evaluating the merits of the Petition.

Amicus Randy Peterson owns land in West Valley City, Utah, a suburb of Salt Lake City. Although there is no surface water evident on the land, the Army Corps of Engineers asserted that the lands were "wetlands," basing their determination upon the saturation of soil below the surface for a period of 12% of the growing season, which, in this Utah location, amounts to roughly 2-3 weeks of the year. The Corps also asserted jurisdiction based upon the migratory bird rule.

Accepting the Corps' determination, Mr. Peterson was told he could develop his suburban property through mitigation. Consequently, he purchased a parcel of property close to the Farmington Bay Wildlife Management area that contained high-quality wetlands. Despite Mr. Peterson's proposals, however, the Corps has told him plainly not to submit a permit application because it will not grant him a permit based on any mitigation plant that includes this parcel. Instead, he has been told he must provide mitigation within the suburban area that is already largely under development by private landowners. When Mr. Peterson pointed out that these other private landowners were either developing without any Section 404 permits, or had been able to obtain permits through mitigation off-site just as he proposed, the supervising Corps employee responded that the Corps could make up whatever rules it wanted.

Further, Mr. Peterson asked the Corps how it made its jurisdictional determination, pointing out that any "wetlands" on his property were isolated and, therefore, not subject to the Corps' jurisdiction under *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Rather than explain the basis of the Corps' jurisdiction, the same Corps supervisor responded by daring him to use his property to see what they would do to him.

Mr. Peterson is well aware of the Corps' abusive and extortionate tactics. He supports the Petition for Writ of Certiorari in the hope that this Court will provide much-needed clarification on the scope of the Corps' jurisdiction under the Clean Water Act. Mr. Peterson believes his experience, as reflective of the experience of many landowners across the nation, will provide this Court with a viewpoint not represented by the parties to this litigation.

For the reasons stated above, Amici respectfully request that this Court GRANT Amici's motion for leave to file this brief.

DATED: February, 2000.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae Pacific Legal Foundation and Randy Peterson is set forth in the preceding motion.

STATEMENT OF THE CASE

The Petitioner, Solid Waste Agency of Northern Cook County (SWANCC), is a municipal corporation made up of 23 municipalities in Northern Cook County, Illinois. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 847 (7th Cir. 1999) (*SWANCC*). SWANCC was created to address, in a comprehensive way, the need for a safe and cost-effective means of disposing of non-hazardous waste. *Id.*

To this end, SWANCC purchased a 533-acre parcel intended to be utilized as a balefill site. *Id.* at 847-48. The parcel had an assortment of trenches and depressions on it, reflecting the land's prior use as a strip mine. *Id.* at 848. Some of these trenches and swales were seasonally or permanently wet. *Id.* On two separate occasions, SWANCC asked the Army Corps of Engineers whether it would need a permit under Section 404 of the Clean Water Act (Act) to carry out its project. *Id.* Both times, after on-site inspections, the Corps concluded that the site did not fall within its regulatory jurisdiction. *Id.*

Thereafter, however, an Illinois state agency informed the Corps that migratory birds used the site. *Id.* As expressed by the court below, "[t]his new information made all the difference to the Corps, because of the so-called migratory bird rule." *Id.* Pursuant to this rule, the Corps asserted jurisdiction. Under the agency's reckoning, migratory bird use satisfies the constitutional requirement that the federal government may only reach activities substantially affecting interstate commerce because people spend millions of dollars every year hunting and observing migratory birds. *Id.* at 849.

Based on the Corps' assertion of jurisdiction, SWANCC applied for a Section 404 permit. *Id.* The Corps denied it. A revised permit application was also denied. *Id.* Subsequently, SWANCC filed this action challenging the Corps' jurisdiction. SWANCC contends that migratory bird use is insufficient to establish federal commerce jurisdiction over isolated waters. The district court ruled in favor of the Corps. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946, 951-52 (N.D. Ill. 1998) (*Solid Waste*). The Seventh Circuit Court of Appeals affirmed. *SWANCC*, 191 F.3d at 847. SWANCC petitions this Court for a writ of certiorari to determine whether the Corps' assertions of jurisdiction comports with the Clean Water Act and the Commerce Clause.

SUMMARY OF ARGUMENT

The migratory bird rule, by which the Corps has expanded its jurisdiction to reach isolated waters having no surface or hydrological connection to any navigable or interstate body of water solely upon the basis that migratory birds use such waters, is a gross distortion of the Clean Water Act. When Congress drafted the Act to allow the Corps to protect "navigable waters," 33 U.S.C. § 1344, it could not have intended the Corps to corrupt the law's statutory definition, "waters of the United States," 33 U.S.C. § 1362(7), to mean every conceivable puddle, birdbath, or sinkhole that a passing duck might wish to call "home." Yet, this is precisely how the Corps has interpreted the term, with the sanction of the court below. *SWANCC*, 191 F.3d at 850. The decision below conflicts with the decision of another circuit, which held that the Clean Water Act reaches only waters closely connected to navigable or interstate waters. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). This Court should grant the Petition for Writ of Certiorari to resolve this conflict in the circuits.

The need for this Court to address the reach of the Corps' jurisdiction under the Clean Water Act is difficult to overstate. The Corps has engaged in a concerted and aggressive effort to expand its jurisdiction through the promulgation of informal "rules" with dubious or nonexistent bases in the Clean Water Act's statutory delegation, while at the same time creating and manipulating administrative and regulatory roadblocks to prevent the regulated community from being able to challenge these erroneous assertions of jurisdiction. In particular, the Corps engages in a pattern and practice of flatly asserting jurisdiction over land use activities by issuing cease and desist orders to landowners, thereby forcing them to face the Hobson's choice of risking criminal or civil penalties, or submitting to the regulatory permitting process. Once in the process, the Corps strings permit applicants along until they either give the Corps whatever mitigation the Corps demands, or give up from economic hardship. It is rarely the case, as happened here, that the Corps issues a permit denial, allowing a landowner to seek redress in the courts. This Court should grasp this opportunity to address an important question of statutory and constitutional interpretation that affects landowners across the nation.

Finally, the notion that migratory bird use animates the interstate commerce power is so flatly absurd, and so clearly beyond any commerce justification ever upheld–or rejected–by this Court, that it should not be further countenanced. This Court should grant the Petition for Writ of Certiorari to affirmatively rebuff the migratory bird rule.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE REACH OF THE CORPS' JURISDICTION UNDER THE CLEAN WATER ACT

> It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (citing Note, 37 Am. L. Rev. 911, 916 (1903)). Likewise, if the Corps happens upon a puddle with a duck floating in it, the agency at once extends the commerce authority of the United States over it. This case deals with the constitutional and statutory validity of this proposition, known as the "migratory bird rule."

The migratory bird rule was developed by the Corps' to justify regulating isolated waters under the Clean Water Act. Because courts have held that the reach of the Act extends as far as the commerce power allows, *SWANCC*, 191 F.3d at 851, the Corps developed the rule to bring even more properties within its regulatory jurisdiction. The theory goes: people hunt and observe migratory birds; people may travel interstate, or purchase hunting and bird-watching equipment that may have moved in interstate commerce, to engage in these activities; therefore, filling a water body used by migratory birds "substantially affects" interstate commerce consistent with *United States v. Lopez*, 514 U.S. 549, 559 (1995).

The court below held that migratory bird use satisfies the constitutional commerce requirement. *SWANCC*, 191 F.3d at 850. It further held that the migratory bird rule was

consistent with the Clean Water Act. *Id.* at 852. This latter decision–that the rule is consistent with the Act–conflicts with the decision of another circuit, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which held that the Act extended only "to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257.

The Act requires individuals to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344. By statute, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362. The Corps has further defined "waters of the United States" by regulation. 33 C.F.R. § 328.3(a) (1999) (emphasis omitted). This case, like *Wilson*, deals with one provision of that regulation, Subsection (a)(3), by which the Corps asserts jurisdiction over

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.

33 C.F.R. § 328.3(a)(3) (1999). The Fourth Circuit struck down this regulation as beyond the Corps' statutory authority. *Wilson*, 133 F.3d at 257.

In *Wilson*, a real estate developer named James Wilson was convicted of violating the Clean Water Act for "knowingly discharging fill and excavated material into wetlands of the United States without a permit." *Id.* at 253. He challenged his conviction by challenging the validity of the Corps' jurisdictional regulation, 33 C.F.R. § 328.3(a)(3), as beyond the Corps' authority under the Commerce Clause. *Wilson*, 133 F.3d at 253. The Fourth Circuit, without ruling on the constitutional question, held the regulation invalid because it purported to

grant the Corps jurisdiction beyond its statutory grant of authority. *Id.* at 257. The court's analysis left no doubt that the Corps' assertion of jurisdiction in cases such as the one here are impermissible:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. . . . Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7), Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.
>
> Accordingly, we believe that in promulgating 33 C.F.R. § 328.3(a)(3) (1993), the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid.

Id. Thus, unless waters are either navigable in fact or closely tied to navigable or interstate waters, the Corps may not reach them in the Fourth Circuit. *Id.* Here, the Corps did not even attempt to show that the wet depressions on SWANCC's land were connected to interstate or navigable waters. Indeed, the Corps specifically found that the ponds did *not* constitute wetlands, lakes, or any other waters defined by the Corps' other jurisdictional regulations. *Solid Waste*, 998 F. Supp. at 949.

The court below, however, held that the Clean Water Act does not confine itself to navigable or interstate waters. In fact, the court found the character of the water to be irrelevant. Though the Act delegates authority to the Corps to regulate "navigable waters" or "waters of the United States," the Seventh Circuit found that, in reality, it gives the Corps authority to regulate bird habitat:

> The United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds. However, any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as SWANCC suggests, but rather "the place where a plant or animal species naturally lives or grows." Before the Corps may assert jurisdiction under the migratory bird rule, it must first make a factual determination that a particular body of water provides a habitat for migratory birds.

SWANCC, 191 F.3d at 850 (citation omitted). One can only wonder how the court divined this intent from the terms "navigable waters" and "waters of the United States" in the bare text of the Clean Water Act.

Ironically, the Seventh Circuit impliedly recognized the conflict between its holding and the decision in *Wilson* by purporting to find *Wilson* inapposite:

> Moreover, we note that SWANCC has not attacked 33 C.F.R. § 328(a)(3) here. Instead, it has limited its objections to the propriety of the migratory bird rule as an interpretation of 33 C.F.R. § 328(a)(3).

Id. at 852. In other words, the Seventh Circuit concluded that its upholding of the migratory bird rule, concededly an interpretation of the regulation struck down in *Wilson*, nevertheless does not conflict with *Wilson*'s holding that the regulation itself is unlawful. This is untenable. The Fourth Circuit held the Corps' regulation invalid precisely because *all* the waters reached by the regulation, being neither navigable nor interstate, were outside the scope of the Act.[2]

Accordingly, because the decisions of the Fourth Circuit and the Seventh Circuit directly conflict over the scope of the Corps' jurisdiction under the Clean Water Act, this Court should grant the Petition for Writ of Certiorari.

---

[2] Moreover, the Fourth Circuit has already held the migratory bird rule invalid, on the basis that the Corps and EPA violated the Administrative Procedures Act in promulgating it. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989). Thus, though the APA issue was not preserved in this petition, the conflict between these circuits is even more stark because the Corps is already collaterally estopped from enforcing the rule in the Fourth Circuit. *See* Fourth Circuit Rule 36.6.

II

THIS COURT SHOULD GRANT THE PETITION TO RECTIFY INTOLERABLE INCONSISTENCIES AND INJUSTICE IN THE CORPS' APPLICATION OF THE CLEAN WATER ACT

A. This Court Should Resolve This Issue Now Because the Corps' Regulatory Practices Are Calculated to Preclude the Ability of Litigants to Challenge This Oppressive Rule

The validity of the migratory bird rule has not arisen frequently in litigation and has been upheld in the Seventh and Ninth Circuits. *SWANCC*, *supra*, *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993); *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995). But the dearth of cases is not indicative of the true impact this rule has on the regulated community.

The infrequency of litigation on this issue is due primarily to the procedural difficulties of ripening a case. A mere assertion of jurisdiction does not constitute agency action subject to judicial review. *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, Department of Interior*, 20 F.3d 1418 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994); *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993); and *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990). As demonstrated below, as a practical matter, this means that once the Corps *asserts* jurisdiction, the Corps in fact *has* jurisdiction and the property owner is left without an effective judicial recourse.

For example, in *Laguna Gatuna*, the "migratory bird rule" was enforced against a company whose sole business was disposing of industrial wastewater. *Laguna Gatuna*, 58 F.3d at 565. Laguna Gatuna's predecessor had asked EPA[3] in 1987 whether the sinkhole into which it dumped the wastewater was subject to the Act. *Id.* EPA responded that "the sinkhole was 'not hydrologically connected' to other waters and there were 'no recreational, industrial, or other uses that could affect interstate commerce.'" *Id.* But in 1991, EPA discovered dead migratory birds near the sinkhole. *Id.* Consequently, EPA ordered Laguna Gatuna to cease and desist its operations. *Id.*

Laguna Gatuna filed a declaratory relief action challenging EPA's jurisdiction. *Id.* Following the decisions of its sister circuits, the Tenth Circuit held that the issuance of a compliance order did not constitute final agency action subject to judicial review. *Id.* at 566. Notably, the court stated:

> *Laguna's policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review is well taken.* Nevertheless, following the reasoning of our sister circuits, we reject Laguna's conclusion such a situation is "constitutionally intolerable."

Id. (emphasis added). Thus, whether or not EPA's assertion of jurisdiction over Laguna Gatuna's sinkhole was lawful, Laguna Gatuna was shut down.

As *Laguna Gatuna* shows, once the Corps asserts jurisdiction through an order, the only way to ripen a case is to ignore the order and risk an enforcement action, or submit to the permitting process. Under the latter course, if a permit is

[3] Both the Corps and the EPA implement the Clean Water Act. Rules and guidelines are promulgated by either, or both, agencies. Consequently, reference to EPA regulation under the Act is attributable to the Corps.

granted, the individual can comply with the permit's conditions, or spend additional resources challenging the Corps' jurisdiction. Of course, a permit denial also constitutes final agency action subject to judicial review. But the apparent simplicity of ripening a case through receiving a permit denial is illusory because the Corps has a remarkable talent for avoiding final agency action, virtually ensuring that a regulated party will never have the opportunity to see the inside of a courtroom.

To illustrate, in *Moore v. United States*, 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes, claiming a loss on the involuntary conversion of some investment property ("the Boy Scout Tract") because it was reclassified as wetlands.[4] *Id.* at 607. The Moores argued that the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. Supporting this argument was an environmental consultant named Bernard Goode, who had worked for the Corps for 34 years. *Id.* at 611.

> When asked for his opinion concerning the likelihood that a § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood

[4] As the court in *Moore* explains,

> [e]arly in 1989, the Government, acting through the Corps and the Environmental Protection Agency . . . adopted the 1989 Wetlands Manual . . . . The 1989 Manual superseded and significantly changed the 1987 Manual's criteria for identifying protected wetlands. One study indicates that the 1989 Manual had the effect of increasing the amount of protected wetlands in the Tidewater region in Southeastern Virginia by 36,000 acres.

Moore, 943 F. Supp. at 605 (citations omitted). This, by itself, gives some indication of the arbitrariness of the Corps' jurisdictional determinations.

that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.

"And that is the outcome of well over half of the 404 applications.

"Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases end up being withdrawn for section 404 permit applications. *Only one percent end up being denied.*"

Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr, an environmental consultant with experience in over sixty § 404 permit applications, testified:

"We advised the [Moores] that there was no chance of getting a permit.

"We also told Mr. Moore [the Corps] would never reject the permit.

"Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.

"Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for . . . . They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."

Doug Davis, an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Moore, 943 F. Supp. at 612 (citations omitted) (emphases added). This testimony–from three individuals intimately familiar with the Corps' permitting process–reveals the general pattern and practice of the Corps of rarely rendering a final decision. And, of course, if a landowner is unable to obtain final agency action, judicial review of any of the Corps' decisions is precluded, including issues relating to jurisdiction.

Thus, the infrequency of litigation on the migratory bird rule is not due to the infrequency of its application; rather, it is due to the infrequency of anyone having the wherewithal, stamina, and forbearance to navigate and survive the costly, time-consuming, and callous procedural quagmire created by the Corps to arrive at the courtroom door.

This makes SWANCC's petition extremely significant. SWANCC is in the unusual position of having had the issue of the validity of the migratory bird rule ripened through the denial of its Section 404 permit, and it is able to bring this matter to this Court's attention in clear and stark terms. What is more, the likelihood of future cases reaching litigation has been rendered even more unlikely because of the Corps' new adjudicative process, *see* 33 C.F.R. §§ 331, *et seq.*, by which permit applicants must exhaust any administrative appeals "prior to filing a lawsuit in the Federal courts based on a permit denial." 33 C.F.R. § 320.1(a)(2).

In short, as a practical matter, judicial review is beyond the grasp of the regulated community. As a result, the Corps is free to regulate as it pleases, assured that, with its endless supply of resources, it will win its war of attrition. The validity of the migratory bird rule will arise rarely in litigation regardless of how often it is applied precisely because the Corps controls the conditions under which litigation may be instituted. This Court should not forego this opportunity to review this important question.

B. This Court Should Prevent the Corps from Engaging in Additional Pernicious Manipulation of Regulatory and Judicial Processes, by Which It Intentionally Evades Judicial Review of Erroneous Assertions of Jurisdiction

As illustrated above, the Corps well understands the difficulty landowners face in obtaining judicial review of its decisions, and uses any available legal doctrines and procedural mechanisms to limit opportunities for litigants to challenge its conduct. The Corps' manipulation of these processes should not be complacently accepted where it insulates the agency from having to answer for its unlawful conduct, or precludes the ability of impacted individuals to obtain judicial resolution of patently legitimate legal questions. This Court should not countenance the utilization of even perfectly legal obstructionist

strategies where they are employed with the aim of allowing the Corps to willfully engage in unlawful behavior.

To illustrate, in the case recounted above, *United States v. Wilson*, the Fourth Circuit held that one of the Corps' jurisdictional regulations, 33 C.F.R. § 328.3(a)(3), was invalid. However, the Corps did not seek review from this Court. Instead, the Corps chose to let the ruling stand and enforce its regulation in the states of every other circuit. While the federal government is not obligated to resolve inconsistencies among the circuits, the Corps' failure to do so in cases such as this inevitably leads to glaring inconsistencies in federal law.

But the Corps took additional measures to muddle the *Wilson* decision. In May of 1998, EPA and the Corps issued a document, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998) (*Wilson* Guidance). In it, the Corps purports to spell out its jurisdiction in the Fourth Circuit. The document is awash in mendacity. In *Wilson*, the Fourth Circuit specifically stated:

> When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

Wilson, 133 F.3d at 257. Notwithstanding this holding, the Corps recalcitrantly maintains in its guidance that

> within the Fourth Circuit states, both the Corps and EPA *will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands*.

Wilson Guidance at 1 (emphasis added).

Further, the regulation invalidated in *Wilson* purported to give the Corps authority to regulate any waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

33 C.F.R. § 328.3(a)(3). Nonetheless, the Corps boldly pronounces that, in the Fourth Circuit, it will continue to assert jurisdiction over intrastate isolated bodies of water for which connections to interstate commerce include:

> [U]se for recreation by interstate or foreign travelers; use for taking fish or shellfish sold in interstate or foreign commerce; use by industries operating in interstate or foreign commerce; use by migratory waterfowl, other game birds, or other migratory birds that are sought by hunters, birdwatchers, or photographers, or are protected by international treaty.

Wilson Guidance at 6. In other words, the guidance informally reenacts the invalid regulation. However, the Corps generously offers that, "in the Fourth Circuit, neither the Corps nor the EPA will cite or rely upon 33 C.F.R. § 328.3(a)(3) as the basis for asserting CWA jurisdiction over any area." *Id.* at 2-3. Thus, landowners in these states are subject to the same regulatory abuse they were subjected to before, but the Corps will now accord them the dubious distinction of not actually *citing* 33 C.F.R. § 328.3(a)(3) as the basis for its jurisdiction.

Similarly, the Corps conveniently excuses itself from complying with the *Tabb Lakes* decision in its guidance:

> [T]he decision did not prohibit the use of migratory birds to establish a connection to interstate commerce under the Clean Water Act. Consequently, notwithstanding the Fourth Circuit's decision in *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds.

Wilson Guidance at 6 n.3. In light of the Corps' demonstrated agility at avoiding any consequences of its litigation losses, one begins to wonder what the federal courts are for.

Understandably, the *Wilson* Guidance so incensed the regulated community that parties at once filed suit challenging it. *National Association of Home Builders v. Carroll*, No. 99-11 (E.D. Va.). The result? A magistrate judge has recommended that the suit be dismissed–on ripeness grounds. *See Builders Lose Round One in Fight Over Wilson Guidance*, Endangered Species & Wetlands Report, Vol. 4, No. 12 (Sept. 1999), at 9.

Repeatedly, the Corps has demonstrated its utter disregard for the constraints placed upon its authority by law. Indeed its maneuvering with respect to its Section 404 jurisdiction is epic. For instance, for years, the Corps took the position that it had no jurisdiction over dredging operations:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of dredging to section 404 which *we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404.*

51 Fed. Reg. 41,210 (1986) (emphasis added). But the Corps changed its position with a self-serving lawsuit settlement.

Thus, following *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D. N.C. 1992), the so-called "*Tulloch* rule" emerged, by which the Corps proceeded to regulate "incidental fallback" from dredging operations as if the fallback constituted "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344.

The Corps enforced the *Tulloch* rule until the District of Columbia Circuit Court of Appeals threw it out as *ultra vires*, finding,

> indeed its overriding purpose appears to be to expand the Corps's permitting authority to encompass incidental fallback and, as a result, a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1399, 1405 (D.C. Cir. 1998). Predictably, the Corps attempted to limit the import of the decision by arguing that the nationwide injunction should be limited to the reach of the Circuit Court–that is, the District of Columbia, alone. *Id.* at 1409. The court declined the invitation. *Id.*

True to form, the Corps issued post-*National Mining* "guidance" for its field offices in 1999. Again, the guidance minimized the Circuit Court's ruling, prompting the National Association of Home Builders to file a motion to compel the agency to comply with the court's injunction. *See generally* Lawrence R. Liebesman, *Tulloch and Its Aftermath: Are the Limits of 404 Regulation Any Clearer?*, EPA Administrative Law Reporter, Vol. 14, No. 5 (Nov. 1999), at 615.

Whatever the legal ramifications of the Corps actions, the practical ramifications are manifestly unjust. Through semantic gamesmanship, the Corps slickly skirts the consequences of any adverse court decisions. Without a definitive ruling from this Court on the reach of the Clean Water Act, the Corps will

continue to oppress landowners through unlawful assertions of jurisdiction. So long as there is no fixed stopping point, the Corps appears committed to its inexorable quest for even greater regulatory control. This Court should grant the Petition for Writ of Certiorari to halt these ambitions.

CONCLUSION

However broadly one might construe the term "waters of the United States" in isolation, the Corps is not free to regulate waters in some manner untethered to the purpose and scope of the Clean Water Act. Through the migratory bird rule, the Corps has expanded its role beyond that of protecting the nation's waters, to that of protecting the nation's feathered visitors. This is not the Corps' delegated function. As Justice Cardozo fittingly framed the issue: "Discretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting). The migratory bird rule ruptures the banks of the Clean Water Act.

For the foregoing reasons, Amici respectfully request that this Court grant the Petition for Writ of Certiorari.

DATED: February, 2000.

Respectfully submitted,

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Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of this Court, the American Farm Bureau Federation requests leave to file the accompanying brief as amicus curiae in support of the petition for a writ of certiorari. Consent for amicus participation was requested of all parties, but denied by the Intervenor-Respondent City of Bartlett.

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 50 states and Puerto Rico representing more than 4.9 million member families. Farm Bureau has par-

ticipated as an amicus curiae in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeals, including issues arising under the Clean Water Act.

American farmers and ranchers own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of wetlands is one of the more serious problems production agriculture faces today.

Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposals sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

One of the more problematic aspects of the Section 404 program is the uncertainty as to what are jurisdictional wetlands. The U.S. Army Corps of Engineers (Corps) has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands, including isolated wetlands that are not in any way connected to any other waters.

Farm Bureau and its farmer and rancher members have a direct interest in the outcome of this case. The Corps' assertion of jurisdiction over isolated wetlands, particularly under their expansive migratory bird rule, threatens to bring millions of acres of agricultural land within the Corps' regulatory sphere. What was conceived as an anti-pollution statute has been effectively stretched into a national land-use zoning act.

The last thing farmers and ranchers need, at what is already a time of economic crises in the industry, is another layer of unwarranted regulation to drive up their costs of doing business, entangle them in endless red tape, and prevent them from using their land in the most productive way possible.

For the reasons stated above, Farm Bureau respectfully requests that the Court grant Farm Bureau's motion for leave to file this brief amicus curiae.

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IN THE
Supreme Court of the United States

No. 99-1178

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,
v.
UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION

The American Farm Bureau Federation respectfully submits this brief as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business,

[1] Counsel for amicus curiae have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submissions of the brief.

economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 50 states and Puerto Rico representing more than 4.9 million member families. Farm Bureau has participated as an amicus curiae in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeals, including issues arising under the Clean Water Act.

American farmers and ranchers own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of wetlands is one of the more serious problems production agriculture faces today.

Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposals sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

One of the more problematic aspects of the Section 404 program, is the uncertainty as to what are jurisdictional wetlands. Thus far, this Court, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has determined only "navigable" and "adjacent wetlands" to be jurisdictional wetlands under the CWA. By the way of a footnote, this Court left open the question of jurisdiction over wetlands that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8.

The U.S. Army Corps of Engineers (Corps) has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands, including isolated wetlands that are not in any way connected to any other waters. The Corps has defined "waters of the United States" to include not only navigable waters, tidal waters and waters adjacent to such waters, but also:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, praire potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce . . . .

33 C.F.R. § 328.3(a)(3) (1998).

The Corps further defined these "other" waters in the preamble to regulations promulgated in 1986 to include waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines . . . .

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

The Corps' assertion of jurisdiction over isolated wetlands, particularly under their expansive migratory bird rule, threatens to bring millions of acres of agricultural land within the Corps' regulatory sphere. What was conceived as an anti-pollution statute has been effectively stretched into a national land-use zoning act.

The last thing farmers and ranchers need, at what is already a time of economic crises in the industry, is another layer of unwarranted regulation to drive up their costs of producing food and fibre, entangle them in end-

less red tape, and prevent them from using their land in the most productive way possible.

Amicus curiae, Farm Bureau, urges this Court to grant certiorari in this case. Private property owners, especially farmers and ranchers who own the bulk of the lands in this country upon which wetlands and potential wetlands are to be found, are in desperate need of this Court's clarification of what are jurisdictional "non-adjacent" wetlands under Section 404 and to specifically address the question of the Corps' authority to regulate isolated wetlands under its migratory bird rule.

ARGUMENTS

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT AMONG CIRCUITS OVER THE CORPS' AUTHORITY TO REGULATE ISOLATED WETLANDS

The courts of appeals have split in their decisions over the extent of the Corps' authority to regulate "other waters . . . the use, degradation or destruction of which could affect interstate commerce" under 33 C.F.R. § 328.3(a)(3), particularly as to the furthest stretch of the Corps' assertion of jurisdiction under the migratory bird rule.

In this case, the Seventh Circuit upheld the authority of the Corps to assert regulatory jurisdiction over isolated wetlands under the migratory bird rule. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (*SWANCC*). The Seventh Circuit rejected arguments that the migratory bird rule violates the Commerce Clause (CONST. art. I, § 8) and exceeds CWA authority. In so doing, the Seventh Circuit placed itself in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) which

invalidated 33 C.F.R. § 328.3(a)(3) as beyond the Corps' statutory authority under the CWA as limited by the Commerce Clause to regulate "navigable" "waters of the United States."

As a result, there currently exists disparate wetland regulations for property owners in the five states of the Fourth Circuit versus the owners of property in the other forty-five states of the nation. While the Corps has attempted to mitigate the impact of the *Wilson* decision in its *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998), it remains that the Corps must make a more substantial showing of a nexus with interstate commerce to exercise Section 404 regulatory authority over isolated wetlands in the states of the Fourth Circuit than the glance of a goose as is the case in the remaining forty-five states.

Such disparate regulation of wetlands among the states as a result of the conflict of the decisions of the Fourth Circuit and the Seventh Circuit over the scope of the Corps' jurisdiction under the CWA is untenable. Private property owners are entitled to consistent treatment under the CWA throughout the country. This Court should, therefore, grant certiorari.

II. THE CORPS' ISOLATED WETLAND REGULATION AND MIGRATORY BIRD RULE EXCEEDS ITS AUTHORITY UNDER THE CWA AND VIOLATES THE COMMERCE CLAUSE

The Fourth Circuit's analysis in *Wilson* leaves no doubt that the Corps' isolated wetlands regulation, 33 C.F.R. § 328.3(a)(3), exceeds its authority under the CWA and violates the Commerce Clause:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are

intrastate nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, not that the covered waters have any sort of nexus with navigable, or even interstate, waters . . . . Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7), Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

Wilson at 257.

Unbelievably, the Seventh Circuit attempted to reconcile its decision in *SWANCC* with that of the Fourth Circuit in *Wilson* by reasoning that upholding the migratory bird rule did not conflict with declaring the isolated wetland regulation itself invalid. *SWANCC* at 852. The fact of the matter is, *Wilson* is directly at odds with *SWANCC*.

Further, Justice Thomas has questioned the validity of the migratory bird rule in his dissent from the denial of certiorari in *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). As Justice Thomas so aptly stated, it "raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the

Clean Water Act." Referring to the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), he observed that actual or potential presence of migratory birds as "[t]he basis asserted to create federal jurisdiction over petitioner's land" is "even more far fetched than that offered, and rejected, in *Lopez*." *Cargill* at 957-958. Justice Thomas concluded that the migratory bird rule "stretches Congress' Commerce Clause powers beyond the breaking point." *Id.*

The Corps' regulation of isolated wetlands, particularly under the migratory bird rule, is controversial and unsettling for property owners, particularly farmers and ranchers upon whose lands an estimated 99 million acres of potential jurisdictional wetlands are believed to exist. See H.R. Report No. 99-271, Part 1, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1103, at 1188 and 1190 (Swampbuster provisions of the Food and Security Act of 1985 intended to slow the conversion of remaining wetlands). Thus, there is a desperate need of this Court's clarification of what are jurisdictional "non-adjacent" wetlands under Section 404 and to specifically address the question of the Corps' authority to regulate isolated wetlands under its migratory bird rule.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 99-1178

In the
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the National Association of Home Builders (NAHB) respectfully moves for leave to submit the accompanying brief amicus curiae in support of Petitioner Solid Waste Agency of Northern Cook County's (SWANCC) Petition for Writ of Certiorari. Written consent for the filing of this brief was granted by counsel of record for SWANCC and Respondent United States Army Corps of Engineers (Corps). The consent letters have been filed with the clerk's office. Consent was withheld by Intervenor-Respondent City of Bartlett.

NAHB represents 200,000 builders, land planners, land developers, and industrial developers. With approximately 850 affiliated state and local associations in all fifty states, NAHB is the most influential trade association representing the nation's housing industry. Because NAHB members are involved in numerous projects throughout the country, NAHB has substantial experience with federal regulation of waters of the United States and can provide the Court with additional insight into the issue at bar.

The rule challenged in this case restricts the development potential of vast areas of land, so this Court's resolution of the issue presented is of great significance to NAHB and its members. A 1995 Corps study indicates that approximately 8.3 million isolated wetlands averaging one-fourth of an acre in size are scattered across 1,836,469 acres of the United States – enough land to affect a multitude of citizens and local governments. The migratory bird rule challenged here subjects these depressions to federal regulation simply because they are or could be used by birds. In the absence of the migratory bird rule, these eight million low spots would fall under the sole jurisdiction of states and local governments. Application of the migratory bird rule is therefore of great consequence to any person or

organization desiring to develop property that includes isolated wetlands or other isolated waters.

NAHB's strong and continuing interest in the issue presented in this case is demonstrated by NAHB's frequent participation in cases before the Court involving federal environmental regulation and land use issues. NAHB has appeared before the Court as amicus curiae in support of a prior petition for certiorari seeking to challenge the Corps' migratory bird rule. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In addition, NAHB has been before this Court either as amicus curiae in support of, or of counsel on behalf of, property owners in numerous prior cases involving government land use decisions. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Reg'l Planning Council*, 117 S. Ct. 1659 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). NAHB has also participated as amicus curiae in Endangered Species Act cases such as *Bennett v. Spear*, 117 S. Ct. 1154 (1997), and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1997). NAHB believes that its participation in this case is likewise warranted.

For the reasons stated above, NAHB respectfully requests that this Court grant its motion for leave to file this brief.

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Advisory Comm'n on Regulatory Barriers to Affordable Housing, "Not In My Back Yard": Remaining Barriers to Affordable Housing (1991) 6
David Sunding and David Zilberman, Analysis of The Army Corps of Engineers' NWP Replacement Permit Proposal (2000) 6
Environmental Laboratory, Department of the Army, Technical Rep. Y-87-1, Corps of Engineers Wetlands Delineation Manual 34-41 (Jan. 1987) 3
United States v. Morrison, Oral Argument Before the Supreme Court, 2000 WL 41232 at 7 (Jan. 11, 2000) ... 8
U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (1995) 4, 15
U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends (1984) 5
Virginia S. Albrecht and Bernard N. Goode, Wetland Regulation in the Real World (1994) 3

The National Association of Home Builders respectfully files this brief as amicus curiae in support of Petitioner, Solid Waste Agency of Northern Cook County.[1]

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae National Association of Home Builders (NAHB) is set forth in the preceeding motion.

SUMMARY OF ARGUMENT

This case concerns the unsuccessful efforts of the Solid Waste Agency of Northern Cook County (SWANCC), a group of Illinois municipalities, to locate and develop a landfill for the citizens of northern Cook County. It involves the same legal issue that went unresolved in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985), and that the Court declined to consider in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied*, 516 U.S. 955 (1995): Whether the Clean Water Act (CWA) and the Commerce Clause of the U.S. Constitution provide the Corps with authority to regulate isolated waters based on the use or potential use of those waters by migratory birds.

CWA Section 404 grants the Corps and the U.S. Environmental Protection Agency (EPA) authority to regulate the discharge of dredged or fill material into waters of the United States. The Corps and EPA by regulation have asserted jurisdiction over isolated waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1999). In the present case, the Corps determined that it

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[1] No counsel for either party authored this brief in whole or in part. No person or entity other than NAHB has made a monetary contribution to the preparation or submission of this brief.

had jurisdiction over the 17.6 acres of isolated waters on the property in question because of the so-called "migratory bird rule." Under the migratory bird rule, a wetland or small pond that is completely unrelated to commerce is deemed to have a sufficient effect on interstate commerce to trigger federal jurisdiction if the water is or would be used as habitat by migratory birds that cross state lines. The Corps denied SWANCC's applications for a permit to fill the 17.6 acres in question because it found that the isolated waters at the proposed site were used as habitat by migratory birds.

The question that the petitioner presents for review is whether the Commerce Clause and the CWA allow the Corps to employ the migratory bird rule to obtain jurisdiction over isolated waters. NAHB believes that this is a matter of sufficient importance to merit the Court's grant of SWANCC's petition for certiorari for at least three reasons.

First, the Seventh Circuit has decided an important question of federal law that has not been but should be decided by this Court. Federal regulation of isolated waters affects thousands of home builders, developers, and private property owners across the country. Whether such regulation is lawful and consistent with the intent of Congress is a question that is appropriate for this Court's consideration.

Second, the Seventh Circuit's decision conflicts with this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995). The rationale adopted by the Seventh Circuit cannot be reconciled with the limits of Congress's Commerce Clause authority recognized by the Court in *Lopez*.

Third, the Seventh Circuit's decision conflicts with the holding of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which struck down the Corps regulation implicitly affirmed by the Seventh Circuit in this case. The Fourth Circuit took this action in order to avoid what it viewed as troubling constitutional questions. The Seventh Circuit

did not appear troubled in the least by the very same constitutional issues surrounding the Corps' regulation of isolated wetlands. This Court should resolve the conflict that lies at the heart of these two very different results.

ARGUMENT

I. CONSIDERING THE VAST EXTENT OF ISOLATED WETLANDS THROUGHOUT THE UNITED STATES, THIS COURT SHOULD DECIDE WHETHER THE MIGRATORY BIRD RULE IS THE PROPER TRIGGER FOR FEDERAL AUTHORITY OVER SUCH AREAS

The issue of federal regulation of isolated waters is a question of considerable concern to NAHB, its 200,000 members, and to the housing industry and homebuyers generally. Given the expansive definition used by the Corps to define wetlands and water bodies, builders encounter isolated wetlands and other isolated waters with considerable frequency. For example, the Corps has expanded the definition of "water body" to include areas that rarely contain water. *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (dry arroyos). The federal definition of "wetlands" is similarly expansive. According to the Corps, an area that is completely dry at the surface 365 days a year still can qualify as a wetland. *See* Environmental Laboratory, Department of the Army, Technical Rep. Y-87-1, Corps of Engineers Wetlands Delineation Manual 34-41 (Jan. 1987). Artificial areas, such as the remnants of a strip mining operation, are not excluded, and there is no minimum size requirement. Indeed, a 1994 study indicated that 15 percent of Section 404 individual permit applications processed by the Corps in 1992 had wetlands impacts less than one-tenth of an acre. Half of the applications involved impacts that were 1.1 acres or less. *See* Virginia

S. Albrecht & Bernard N. Goode, Wetland Regulation in the Real World 20, 22 (1994).[2]

A 1995 Corps study of isolated wetlands measuring less than one-half acre documents the migratory bird rule's importance in establishing federal jurisdiction over tiny, remote areas. The Corps' study did not include data from Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, and West Virginia. It did not include isolated wetlands measuring one-half acre or larger, and it excluded "other waters" (such as ponds) that are not wetlands. Even with these omissions, the Corps' study found that there are 8,309,502 discrete isolated depressional areas meeting the federal wetlands definition scattered across 1,836,469 acres of the American landscape. *See* U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) (1995 Corps Data Forms). The Corps' regulations state that it may assert jurisdiction over such isolated wetlands if the use, degradation, or destruction of those wetlands could affect interstate commerce. The Corps' regulations go on to specifically enumerate several categories of isolated waters that meet this test. Generally, the isolated waters identified in the Corps study are too small to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3)(i)-(iii). Thus, the migratory bird rule is the only route by which the federal government can assert jurisdiction over these areas.

This, however, is not a material limitation on the scope of the Corps' authority. Each of the eight million areas identified in the Corps' study, as well as innumerable "other waters," are susceptible to migratory bird use. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory

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2 One such project involved a proposed impact of 0.0006 acres, or about 26 square feet. This is about half the size of a ping-pong table.

birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service). As the Seventh Circuit itself noted, there are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) (*SWANCC*). Nothing can prevent these birds from traveling throughout the Western Hemisphere and eventually alighting on any land or water in the United States. In one study, for example, researchers marked birds in North Dakota and later recovered them in 46 states, ten Canadian provinces and territories, and 23 other countries.[3] In addition, the migratory bird rule does not even require actual "use" by birds; potential use is sufficient, and there is no minimum standard for kind or frequency of use, or a requirement that a water be used by a particular type of migratory bird such as waterfowl. Thus, the migratory bird rule in practice provides the basis for the Corps to assert jurisdiction over virtually all of the 8 million depressional areas identified in its study. Clearly, the impacts of Corps jurisdiction based on the migratory bird rule are widespread.

For home builders, the consequences of federal regulation of isolated waters are all too concrete. The presence of a federally regulated isolated water on a development parcel means that the developer is left with a simple choice: avoid the regulated area and leave it in its natural state (and thereby give up what might otherwise be developable land), or obtain authorization in some form from the Corps to impact all or part of the area. Either course entails costs to the developer, costs

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3 See U.S. Fish & Wildlife Serv., Wetlands of the United States: Current Status and Recent Trends 1 (1984).

which are often reflected in increased housing prices.[4] Indeed, nearly ten years ago the Advisory Commission on Regulatory Barriers to Affordable Housing found that "environmental protection legislation and associated regulations dealing with wetlands often unnecessarily raise the cost of housing." Advisory Comm'n on Regulatory Barriers to Affordable Housing, "Not In My Back Yard": Removing Barriers to Affordable Housing (1991). This conclusion is still valid today.[5] Given these widespread economic impacts as well as the uncertainty among the lower courts discussed below regarding the extent of Corps jurisdiction, the important question of the extent of federal jurisdiction over isolated waters should be decided by this Court.

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[4] A recent study found that the average cost of preparing a Section 404 permit application is $271,596, which does not include the significant additional costs such as those associated with mitigation and the carrying costs of the land during a lengthy permitting process that takes an average of 405 days. *See* David Sunding and David Zilberman, Analysis of The Army Corps of Engineers' NWP Replacement Permit Proposal (2000).

[5] In fact, the Corps has substantially revised its nationwide permit program to make it more difficult for builders to obtain federal authorization to impact isolated waters. *See* 65 Fed. Reg. 12,818 (2000). Nationwide permits are general permits that are intended to provide a streamlined approval process for projects that would have minimal impacts on waters of the United States. Such permits have historically been widely used by home builders. Among other things, the Corps has eliminated Nationwide Permit 26, which authorized impacts of up to three acres of isolated wetlands and certain other waters of the United States for a single project, and replaced it with a new nationwide permit (No. 39) which limits impacts to only one-half acre of waters of the United States, a reduction of 84 percent in the acreage limit.

II. THIS CASE WARRANTS THIS COURT'S REVIEW BECAUSE THE LOWER COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *LOPEZ* AND TRADITIONAL CONCEPTS OF FEDERALISM

A. The Seventh Circuit Misapplied the "Aggregate Effects" Doctrine in Determining Whether the Destruction of the Habitat of Migratory Birds "Substantially Affects" Interstate Commerce

The Corps' claimed authority to regulate isolated waters via the migratory bird rule extends far beyond the bounds of the Commerce Clause and is contrary to the principles articulated by this Court in *Lopez*. Like the gun control statute in *Lopez*, the migratory bird rule is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to regulate an instrumentality of or thing in interstate commerce. Therefore, it can only be sustained if it regulates activities that substantially affect interstate commerce. *See Lopez*, 514 U.S. at 555-58. The activities being regulated here do not meet that test.

The Seventh Circuit made no attempt to determine whether the isolated waters that SWANCC proposed to fill substantially affect interstate commerce. Rather, the court found that although the effect of the destruction of migratory bird habitat is unobservable with respect to each isolated pond, the aggregate effect is clear: The resulting decrease in bird populations "substantially affects" interstate commerce. This, the Seventh Circuit reasoned, is all the Commerce Clause requires. *See SWANCC*, 191 F.3d at 850.

The Seventh Circuit's conclusion runs counter to *Lopez*, which - as the United States itself has recently acknowledged - ruled that regulation of intrastate economic activity is analyzed differently from the

regulation of intrastate non-economic activity.[6] *Lopez* stated that isolated incidents of intrastate non-economic activity cannot be aggregated to indicate a substantial effect on interstate commerce. *See* 514 U.S. at 559-61. In particular, the Court indicated that the effects of individual activities may be aggregated to achieve the required substantial effect on interstate commerce *only* where the activities in question are economic or commercial in nature or where the regulation in question is part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 561.[7] The migratory bird rule does not meet this test.

The activities in question here cannot be characterized as "economic" under the Court's Commerce Clause jurisprudence. When the Supreme Court has upheld federal regulation of intrastate activity "substantially affecting" interstate commerce, the cases have always involved activities or markets that were in and of themselves economic in nature, such as agriculture, the shipment of goods, or employment. *See e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (employment); *Hodel v. Indiana*, 452 U.S. 314 (1981)

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[6] During a recent oral argument before the Court, the Solicitor General stated that *Lopez* provided a four-part test for judicial scrutiny of legislation that neither regulates economic activity nor is itself part of a larger regulation of economic activity. *See United States v. Morrison*, Oral Argument Before the Supreme Court, 2000 WL 41232 at *7 (Jan. 11, 2000).

[7] Recently, the Third Circuit noted that courts, much like the Seventh Circuit, have adopted the general principle of *Wickard v. Filburn* – that repeated intrastate activity may substantially affect interstate commerce – in situations that are economically unlike *Wickard* and that require a chain of inferences before a connection between intrastate and interstate activity may be clearly drawn. *See United States v. Rodia*, 194 F.3d 465, 476-77 (3d Cir. 1999). The Third Circuit also observed that courts have applied the aggregation principle to all activities, both economic and non-economic, without acknowledging that *Lopez* approved of aggregation only in conjunction with economic activity. *See id.* at 477.

(coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (employment); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (barbecue restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (accommodations at inns and hotels); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944) (employment); *Wickard v. Filburn*, 317 U.S. 111 (1942) (commercial wheat farmer); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (commercial milk sales); *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1 (1824) (navigation). The discharge of dredged or fill material is not an economic activity in this sense. While discharges may be incidental to economic activities, they are not inherently economic in nature. They are more akin to the gun possession in *Lopez*, which was ultimately intended to lead to a commercial transaction (the sale of the gun) but which itself had no inherently economic dimension and which was found by the Court to be a non-economic activity.

In addition, this Court has indicated that even intrastate, non-economic activity may be regulated under the Commerce Clause in some circumstances. When an intrastate activity which is not in and of itself "economic" is "an essential part of a larger regulation of economic activity," it may "be sustained under [Supreme Court] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

However, the prohibition on the presence of the development of a landfill site due to 17.6 acres of semi-aquatic property used by migratory birds cannot be sustained as "an essential part of a larger regulation of economic activity." Though wetlands are often filled to produce more economically viable areas, the Section 404 program cannot be characterized as a regulation of

economic activity. The program regulates a wide variety of activities, including many undertaken by homeowners or by government agencies in connection with the provision of recreational facilities, parks, and even wildlife refuges. Thus, the Section 404 program is not a regulation of a commercial market or a class of economic activities. Nor is the Clean Water Act generally a larger regulation of economic activity. Indeed, the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C.A. § 1251(a) (1999), not to regulate markets or commercial activities.

Thus, because the regulation of isolated waters is not a regulation of economic activity and is not part of a larger regulation of economic activity, *Lopez* does not permit the Corps to establish the requisite substantial effect on interstate commerce by aggregating the effects of impacts to all isolated waters. The Seventh Circuit's decision to the contrary is therefore in conflict with *Lopez*.

Moreover, the Seventh Circuit's approach is at odds with this Court's mandate that the analysis of substantial effects not be carried to the point that federal regulation obliterates the distinction between what is national and what is local. *See Lopez*, 514 U.S. at 557. A loose application of the aggregation principle such as that engaged in by the Seventh Circuit would bring all isolated waters under the coverage of the migratory bird rule. If the Corps can regulate, in the aggregate, waters that are or could be used as habitat by migratory birds, it most certainly can regulate "individual members" of that class. While the Seventh Circuit purported to impose limits on the Corps' jurisdiction by citing a definition of habitat ("the place where a plant or animal species naturally lives or grows[,]" Websters Third New Int'l Dictionary 1017 (1993)), such a limitation is an empty gesture. Birds are everywhere; as previously noted, there are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. Moreover, birds can and do live anywhere, including a wide variety of urban and suburban environments. Therefore,

allowing the Corps to regulate the habitat of migratory birds gives the Corps carte blanche to regulate any isolated water it chooses, effectively giving the Corps land use control over millions of acres of property under the guise of regulating "navigable waters."

Lopez does not permit such an interpretation of the aggregation principle. In fact, in *Lopez*, the Court cited several cases indicating that although modern precedent has expanded congressional power under the Commerce Clause, such power is not without limits. *See Lopez*, 514 U.S. 556-57 (1995). In *Jones v. Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), the Court explained that the interstate commerce power may not be extended to cover such indirect and remote effects on interstate commerce as to "'effectively obliterate the distinction between what is national and what is local and create a completely centralized government." In *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968), in response to the dissent's position that Congress could regulate and control even the minutest activities affecting commerce, the majority declared that neither in *Wirtz* nor in *Wickard* had the Court allowed a relatively trivial impact on commerce to provide Congress an excuse for broad general regulation of state or private activities. In light of the Court's rationale in *Lopez*, *Laughlin Steel*, and *Wirtz*, the Seventh Circuit should not have allowed Congress' regulatory power under the Commerce Clause to be stretched far enough to allow the Corps to regulate minute, isolated waters using the migratory bird rule. In fact, the same rationale, if left unchecked, would permit Congress to assert control over all land and establish itself as a super zoning authority with nationwide jurisdiction. As discussed further below, such a result could hardly be countenanced.

In short, the Seventh Circuit's decision to uphold the Corps' assertion of jurisdiction over isolated wetlands

because of the aggregate effects of impacts on habitat for migratory birds conflicts with this Court's reasoning in *Lopez*. In no way is the prohibition on filling the waters at issue in *SWANCC* capable of characterization as a commercial regulation or as part of a larger regulation of economic activity.

B. The Migratory Bird Rule Undermines the Requirement that a Regulation Contain a Jurisdictional Element that would Ensure, Through Case-by-Case Inquiry, that the Activity Being Regulated Affects Interstate Commerce

Even though it regulates non-economic, intrastate activity, the migratory bird rule could still fall within the bounds of Congress' Commerce Clause authority if it contained an appropriate jurisdictional element requiring that the requisite interstate commerce connection be determined on a case-by-case basis. *See Lopez*, 514 U.S. at 561-62. Although the Corps regulation that the migratory bird rule purports to interpret contains a jurisdictional element, *see* 33 C.F.R. § 328.3(a)(3) (federal jurisdiction extends to waters only if their use, degradation or destruction could affect interstate commerce), this jurisdictional element cannot rescue the migratory bird rule from constitutional infirmity.

First, the test set forth in the migratory bird rule does not appropriately limit the universe of waters that are made subject to regulation because the rule purports to encompass both areas that are used as habitat by migratory birds as well as areas that could be used. In other words, the jurisdictional element covers those areas with only a potential link to migratory bird use and therefore a potential link at best with interstate commerce. There is no requirement that the Corps demonstrate that the isolated water has been used in a way that would even begin to establish any connection with interstate commerce, much less a substantial

connection. Moreover, unlike other jurisdictional elements that have been held sufficient by courts to sustain statutes against constitutional challenges, *see e.g., United States v. Bass*, 404 U.S. 336 (1971), the jurisdictional element in this case is not found in the statute but in the regulations and therefore may be changed at the whim of the agency. Thus, the jurisdictional element in the Corps regulations cannot save the migratory bird rule.

C. By Using the Migratory Bird Rule to Claim Jurisdiction over Intrastate Property, the Federal Government Has Displaced Traditional State Jurisdiction Over Land Use.

The migratory bird rule warrants particularly careful scrutiny by this Court because, in determining whether development may occur in particular areas, the federal government treads upon ground traditionally reserved to the states by the Tenth Amendment. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed").

The use of real property is a traditional State concern. *See Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). In particular, States are regarded as the proper governing body to enact and enforce property laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land-use planning has been sustained against constitutional challenge as long ago as the decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (state land-use law applicable to federal land). Moreover, decisions regarding local land use "properly rest with the community that is ultimately - and intimately - affected." *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992).

Thus, zoning and other aspects of land use regulation "are particularly within the province of local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Evans v. Board of County Commissioners*, 994 F.2d 755, 761 (10th Cir. 1993) (land use policy is a feature of local government and an area in which the tenets of federalism are particularly strong).

The Corps has taken the position that simply because migratory birds inhabit the property that SWANCC intended to develop as a landfill, SWANCC is prohibited from using it. As a result, the Corps has effectively overridden the plan developed by 23 municipalities to address a local issue as basic as where to dump their garbage, in the process disrupting local land-use plans and zoning decisions and diminishing local governments' ability to address an issue of vital concern to citizens. This intrusion is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment. *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) ("'[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"); *New State Ice Co. v. Liebmann*, 385 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (as a "social laboratory," states have the ability to react to local problems in a manner best adapted to local needs). States must not be prohibited from "exercising their own judgment in an area to which States lay claim by right of history and expertise [through regulation of] an activity beyond the realm of commerce in the ordinary and usual sense of that term." *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

By utilizing the migratory bird rule to exercise jurisdiction over intrastate, isolated waters, the federal government has effectively preempted traditional state

authority over the use of millions of acres of land.[8] In the absence of the migratory bird rule, these areas would be subject to the wetlands laws enacted by many states and over 5,000 local governments.[9] Unfortunately, where property contains isolated waters as defined by the federal government, state and local governments cannot implement their land use regulations until the federal government approves of the local development projects – a textbook violation of the basic principles of federalism.

When Congress enacted the CWA, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the

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[8] As an example of the broad reach of the federal program, consider the State of Georgia's approximately 240,000 isolated wetlands that are each less than one-half acre. *See* 1995 Corps Data Forms. The migratory bird rule provides the federal government with 240,000 opportunities to trump State and local authorities in their traditional role as regulators of land use.

[9] Many states have their own wetland protection statutes. *See, e.g.*, Conn. Gen. Stat. §§ 22a-28 to -45a (2000); Fla. Stat. Ann. §§ 373.414 - .421 (2000); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -Z (2000); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (2000); Mich. Comp. Laws §§ 324.30301 - .30323 (2000); Minn. Stat. § 103G.222 - .2373 (2000); N.H. Rev. Stat. Ann. §§ 482-A:1 - :27 (2000); N.J. Rev. Stat. §§ 13:9B-1 to -30 (2000); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1305 (2000); Vt. Stat. Ann. tit. 10, § 1272 (2000). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42; Me. Rev. Stat. Ann. tit. 38, § 480-F; Minn. Stat. § 103G.2243; N.Y. Envtl. Conserv. Law § 24-0501. For examples of local ordinances or by-laws regulating isolated waters and wetlands, *see* Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); *see also* Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture) available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C.A. § 1251(b) (1999). Congress also did not extend regulation to many known sources of water pollution, such as runoff from agricultural and silvicultural operations. Similarly, Congress excluded groundwater from the CWA's coverage because it wanted to avoid involving the federal government in complex state jurisdictional rules. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). Congress also enacted Section 208 to encourage the States to develop and implement waste treatment management plans that would cover pollution sources not regulated by federal law. *See* 33 U.S.C.A. § 1288 (1999). Congress clearly tried to balance federal regulatory authority where necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere.

The migratory bird rule nullifies this balance, extending federal authority to more than eight million isolated depressions, most of which would be covered under State or local regulations. Accordingly, this Court should inhibit the blurring of the federal and State spheres of power, *see Lopez*, 514 U.S. at 577 (Kennedy, J., concurring), by granting SWANCC's petition for certiorari and addressing this issue.

III. SUPREME COURT GUIDANCE IS NEEDED TO RESOLVE DIVISION AMONG THE COURTS OF APPEALS

The issue of the proper scope of federal jurisdiction over isolated waters has split the three courts of appeals that have reviewed it. The division between the Fourth, Seventh, and Ninth Circuits is an independent and legitimate basis for Supreme Court review of the Corps' use of the migratory bird rule to assert jurisdiction over isolated waters.

In *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310, 1316 (7th Cir 1992), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *administrative order for penalties vacated*, 999 F.2d 256 (7th Cir. 1993), the Seventh Circuit first held that the CWA was never intended to reach isolated wetlands and that Corps and EPA jurisdiction over such wetlands exceeded Congress' Commerce Clause power. On rehearing, two of the panel's judges held that the waters' connection to interstate commerce could be established through use by migratory birds, while the third judge remained of the view that the migratory bird rule exceeded the scope of the Corps' authority. *See id at 261.* The Seventh Circuit again upheld the migratory bird rule in *Rueth v. United States*, 13 F.3d 227 (7th Cir. 1993), and in this case.

The Ninth Circuit also has upheld the validity of the migratory bird rule, though not without reservation. It explained that although there is no suggestion in the CWA that isolated waters used by migratory birds are covered by that Act, the CWA's policy of protecting wildlife "could plausibly be read to stretch this far," while acknowledging that the migratory bird rule "certainly tests the limits of Congress's commerce powers and, some would say, the bounds of reason." *Leslie Salt v. United States*, 55 F.3d 1388, 1394-1396 (9th Cir. 1995). The court reasoned that though the CWA does not mention isolated wetlands, legislative history from 1972 provides support for the proposition that Congress intended the CWA's jurisdiction to reach waters of the United States to the maximum extent possible under the Commerce Clause. *See id.* at 1394-95. This Court elected not to grant certiorari in *Leslie Salt*, though Justice Thomas dissented from the denial. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995). He would have granted certiorari to resolve whether the possibility of a visit from or the occasional presence of migratory birds creates a sufficient nexus with interstate commerce to permit Corps regulation. *See id.* at 956.

The Fourth Circuit recently issued a decision that cannot be reconciled with the Seventh Circuit rulings and *Leslie Salt*. In *United States v. Wilson*, 133 F.3d 251, 253 (4th

Cir. 1997), the defendants, who were convicted of felony violations of the CWA for knowingly discharging fill material into wetlands without a permit, challenged, among other things, the validity of 33 C.F.R. § 328.3(a)(3), which defines "waters of the United States" as waters whose use, degradation, or destruction "could affect" interstate commerce. The Fourth Circuit noted that the regulation does not require that the regulated activity have a substantial effect on interstate commerce nor that the waters at issue have any nexus with interstate waters. *See id.* at 257. If this regulation were a statute, the court stated, it would "present serious constitutional difficulties" because it exceeds Congress' authority under the Commerce Clause. Noting that the CWA should be interpreted "in light of the constitutional difficulties that would arise by extending the Act's coverage to waters that are connected closely to neither interstate nor navigable waters, and which do not otherwise substantially affect interstate commerce," the court explained that "[a]bsent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Id.*

The *Wilson* court stated that one would expect that the term "waters of the United States," when used to define the phrase "navigable waters," would refer to waters that, if not navigable in fact, are at least interstate or closely related to interstate or navigable waters. However, because 33 C.F.R. § 328.3(a)(3) includes intrastate waters that need have no connection whatsoever to navigable or interstate waters, it expands the term "waters of the United States" beyond permissible limits. Accordingly, the court held 33 C.F.R. § 328.3(a)(3) invalid. *See id.*

The Seventh Circuit in *SWANCC* stated that *Wilson* is factually distinct, and therefore inapplicable. *Wilson*, the court reasoned, involved a challenge to 33 C.F.R. § 328.3(a)(3), which defines the term "waters of the United

States" to include all waters whose use or degradation could affect interstate commerce. The *Wilson* court, according to the Seventh Circuit, had found the regulation to be invalid because Congress does not have the authority to regulate waters that "could" affect interstate commerce. *See SWANCC*, 191 F.3d at 851-52. The Seventh Circuit also attempted to distinguish *Wilson* by reasoning that the facts in *SWANCC* demonstrate that filling the 17.6 acres at issue would have an immediate effect on the migratory birds that use the area; there was no reason to speculate as to whether filling the semi-aquatic area and thus harming migratory birds "could" affect interstate commerce. The Seventh Circuit also reasoned that SWANCC, unlike the appellant in *Wilson*, had not attacked 33 C.F.R. § 328.3(a)(3). Rather, it confronted an interpretation of the regulation, *i.e.*, the migratory bird rule. *See id.* at 852.

The Seventh Circuit's attempt to explain away *Wilson* does not withstand scrutiny. First, though the facts may have indicated that migratory birds would be negatively affected if the 17.6 acres at issue were filled, the court never explained how such harm to migratory birds would have any effect on interstate commerce. As Justice Thomas noted in his dissent in *Cargill*, 516 U.S. at 959, the record did not show that humans ever visited the relevant property to hunt, trap, or observe migratory birds, or that petitioner's activities would harm any birds. Moreover, besides the occasional presence of migratory birds, there was no evidence that the land at issue would have any effect whatsoever on interstate commerce. Given the Fourth Circuit's view of the "constitutional difficulties that would arise by extending the [CWA's] coverage to waters . . . which do not . . . substantially affect interstate commerce," *Wilson*, 133 F.3d at 258, it is clear that the Fourth Circuit would have been equally troubled by the assertion of jurisdiction in this case, evidence of actual bird use notwithstanding.

Second, it makes no sense to distinguish an agency's regulation from an interpretation of that

regulation and claim that even if the regulation is invalid, an interpretation or clarification of that regulation can still be upheld. The *Wilson* court would not have upheld the migratory bird rule as an interpretation of the term "waters of the United States" after finding the underlying regulation (33 C.F.R. § 328.3(a)(3)) constitutionally troubling. Moreover, application of the migratory bird rule provides an even broader interpretation of "waters of the United States" as it merely requires that water have a potential connection to migratory birds rather than a potential connection to interstate commerce. Clearly, *Wilson* cannot be distinguished.

This court should not tolerate a circuit split on an issue as vital as the reach of federal jurisdiction under the CWA. States, municipalities, developers, and home builders are entitled to the benefits of uniform application of the CWA and its regulations in each of the fifty states. The success of development projects should not ride on whether the State in which the development will take place follows *Wilson* or the Seventh Circuit's decision in *SWANCC*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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No. 99-1178

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CARGILL, INCORPORATED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Cargill, Incorporated ("Cargill") respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioner and Respondent U.S. Army Corps of Engineers ("Corps"). Consent was withheld by Intervenor-Respondent City of Bartlett.

Cargill, besides its holdings in other states, is the successor of Leslie Salt Co. and, as such, is the largest private landowner in the San Francisco Bay Area, owning some 17,000 acres and holding a perpetual right for salt-making and related uses over an additional 12,000 acres. On much of the acreage, Cargill is engaged in salt-making by the process of solar evaporation and precipitation. Portions of Cargill's acreage, after having been used in the industrial salt-making operation for many years, were decommissioned a number of years ago. Other areas remain in active use as an industrial concern.

Because of the Corps' aggressive assertion of Clean Water Act ("CWA") jurisdiction over its lands, purportedly under the authority of the "migratory bird rule," Cargill has in the past sought to challenge the "rule" in this Court. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In addition, because operations on its lands are, and may be, affected by other federal environmental laws, Cargill has participated as amicus curiae before this Court concerning the validity of expansive agency interpretations of such laws. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995).

Cargill's perspective and litigation experience in dealing with the issues presented in this case will provide a unique

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

viewpoint that will aid the Court in evaluating the merits of the Petition.

Disputes between the Corps, various environmental groups, and Cargill and its predecessor Leslie Salt Co., concerning the extent of CWA jurisdiction over Cargill's property span more than 25 years. Initially, the focus was upon the interrelationship between the CWA Amendments of 1972 (33 U.S.C. §§ 1311(a), 1344(a), 1362(12) and 1362(7)) and the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, *et seq.*) under which the Corps had historically exercised regulatory authority over navigable waters of the United States. *See Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra Club v. Leslie Salt Co.*, 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). However, with the creation of the "migratory bird rule" in 1986 by the Corps and the U.S. Environmental Protection Agency ("EPA"), ignore the focus changed. No longer was the concern about the status of true waters on Cargill's lands, but whether manmade facilities no longer used for solar salt production—neither part of nor adjacent to navigable waters, and possessed of no hydrologic connection (surface or otherwise) to any navigable water—could be subject to jurisdiction under section 404 of the CWA solely based on their use or potential use by migratory birds. Assertions of regulatory jurisdiction on this ground over certain portions of Cargill's lands led to two decisions of the Ninth Circuit Court of Appeals,[2] relied upon heavily by the Seventh Circuit here, together with two petitions for certiorari to the Court[3] and a number of district court decisions.[4]

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[2] *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (*"Leslie I"*); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) (*"Leslie II"*).

[3] *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

[4] *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987); *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1988); *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992).

Following the conclusion of the *Leslie Salt* litigation, a further assertion of jurisdiction under the "migratory bird rule" by two environmental groups led to a radical expansion of the reach of the rule. *San Francisco BayKeeper v. Cargill Salt Division*, No. C96-02161 CAL (N.D. Cal., Apr. 15, 1999). The district court's decision is now on appeal before the Court of Appeals for the Ninth Circuit (Case No. 99-16032).

The district court in the original *Leslie Salt Co.* proceeding found that the periodic collections of rainwater were so temporary and ephemeral that they did not constitute a waterbody, much less a "water of the United States" that could be subject to the CWA. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-486 (N.D. Cal. 1988). Its decision in favor of Leslie Salt was reversed on appeal in *Leslie I* in a divided opinion. 896 F.2d at 354. After concluding that the temporary nature of the ponded rainfall was not an impediment to CWA jurisdiction, the panel majority—in one sentence, without analysis—sustained the "migratory bird rule" on the theory that "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360.

Following remand to determine the extent of temporary ponding and migratory bird use, Leslie Salt again appealed to the Ninth Circuit. On the second appeal, a differently constituted panel of the Ninth Circuit affirmed on the basis that, in the panel's view, it could not reconsider the prior decision, even if persuaded the decision was wrong, so long as it was not "clearly wrong." *Leslie II*, 55 F.3d at 1393. Following this unusual standard for questions of law, the court addressed whether application of the "migratory bird rule" to very shallow, non-navigable seasonal ponds wholly unconnected to any other waterbody was authorized by the CWA. The court found that "Cargill's arguments might well deserve closer consideration" if the issue were being presented to it for the first time. *Leslie II*, 55 F.3d at 1395. However,

since the court concluded that the initial panel's earlier decision was not "clearly erroneous," it did not reconsider the question. *Id.* Nonetheless, the court acknowledged that the "migratory bird rule" "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie II*, 55 F.3d at 1396.

Cargill, as successor to Leslie Salt Co., petitioned this Court for a writ of certiorari following the Ninth Circuit's *Leslie II* decision. In dissenting from denial of the writ, Justice Thomas argued that *United States v. Lopez*, 514 U.S. 549 (1995), reaffirmed the well-accepted doctrine that the activity to be regulated must *substantially* affect interstate commerce before Congress can regulate it pursuant to the Commerce Clause. *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995). He observed that no such showing had been made to support application of the "migratory bird rule" to Cargill's property. *Id.*

In 1996, on the strength of *Leslie I* and *Leslie II*, San Francisco BayKeeper and Citizens Committee to Complete the Refuge sued Cargill for violations of the CWA on the theory that rainwater that periodically fell on saline brine within an isolated, self-contained waste treatment facility,[5] transformed that portion of the facility covered with brine into a "water of the United States" because it was occasionally used by migratory birds. The same district judge that heard *Leslie I* and *Leslie II* felt compelled by the Ninth Circuit's two opinions to rule in plaintiffs' favor, in the process admitting the unreasonableness of the result.[6] *San Francisco BayKeeper*

[5] Cargill maintains that the site in question is a "waste treatment system" and, therefore, is not a water of the United States under the CWA. 40 C.F.R. § 122.2. This issue is presently before the Ninth Circuit in Cargill's appeal.

[6] "So I believe that the requirements of the regulation are satisfied; that the jurisdictional requirements of being a water of the United States, both under the regulations and under the two Ninth Circuit cases, does satisfy the requirements of being a water of the United States. [¶] That may not be terribly practical. When we have an industrial facility obviously moving around water, moving around salts, producing salt, big wide flat areas obviously with some depressions in them where water can collect or where

v. Cargill Salt Division, No. C96-02161 CAL (N. D. Cal., Apr. 15, 1999). In its pending appeal to the Ninth Circuit, Cargill is challenging the district court's expansion of the reach of the Leslie Salt decisions and the "migratory bird rule" on many of the same grounds asserted by Petitioners here.[7]

Given Cargill's previous CWA jurisdictional disputes with the Corps, the pending BayKeeper litigation now before the Ninth Circuit and the fact that Cargill continues to operate some 29,000 acres—much of which is potentially subject to the claim of migratory bird jurisdiction—it is plain that Cargill has a real interest in the outcome of this case. Cargill's special position will bring to bear a fresh perspective that will be helpful to the Court's resolution of the issue.

For the reasons stated above, Cargill respectfully requests that this Court GRANT its motion for leave to file this brief.

DATED: March 2000

Respectfully submitted,

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they've been leveed off for one purpose or another, it doesn't make any practical sense to say, 'Well, we'll take a small area of this and water gets in it, so we define it as a water of the United States.' [¶] Maybe it doesn't, but I have to be governed by the definitions of the Ninth Circuit and the definitions of the regulations, and I think this battle got fought out at least four times in the *Leslie Salt* litigation and that's twice before me and twice before the Ninth Circuit." Tr. of Jan. 26, 1998 hrg. at 34-35 (No. C96-02161 CAL).

[7] Cargill maintains that subjecting the area covered by liquid brine within Cargill's waste treatment facility to CWA jurisdiction on the ground that the brine has been converted into a water of the United States by virtue of its use by migratory birds has pushed the reach of the CWA migratory bird rule well beyond the earlier *Leslie Salt* decisions. The saline brines contained within Cargill's waste treatment facility are, of course, themselves pollutants under the CWA.

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No. 99-1178

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE CARGILL, INCORPORATED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Cargill, Incorporated ("Cargill") respectfully submits this brief as amicus curiae supporting the granting of Solid Waste Agency of Northern Cook County's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICUS

The interest of Cargill is set forth in the preceding motion.

ARGUMENT

A. THE MIGRATORY BIRD RULE'S EXTENSION OF REGULATORY JURISDICTION IS INCONSISTENT WITH ANY REASONABLE CONSTRUCTION OF THE CLEAN WATER ACT.

The Seventh Circuit below, relying upon the Ninth Circuit's *Leslie I* decision, concluded that CWA reaches "as many waters as the Commerce Clause allows." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999). The Seventh Circuit opined that "if Congress possesses the power to regulate a body of water under the Act, generally this court will conclude that it has in fact done so." *Id.* at 851. Based upon this dubious proposition, the court held regulation of waters based on the presence of migratory birds is authorized by the CWA. *Id.* at 853. This conclusion, we submit, is directly in conflict with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). That court invalidated the entirety of the regulation the "migratory bird rule" is said to interpret on the ground it is unauthorized by the CWA in that it purports to regulate wholly intrastate non-navigable waters if the degradation of those waters could affect interstate commerce. *Id.* at 257. Indeed, Fourth Circuit expressed considerable doubt as to whether Congress itself could expressly extend its reach over such areas under the Commerce Clause, but did not reach that question because it concluded that the CWA does not authorize such an expansion. *Id.*

Wilson is the Fourth Circuit's most recent rejection of the "migratory bird rule." In 1989, that court had found the rule wanting as violative of the Administrative Procedure Act. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989). To this day, the Administrative Procedure Act shortcoming of the rule (i.e. the failure to subject the rule to notice and comment) remains and the rule is not applied within the geographic area of the Fourth

Circuit.[8] In fact, the reason why the Corps, in *Wilson*, relied upon the underlying regulation, 33 C.F.R. section 328.3(a)(3), rather than the "migratory bird rule" itself is because the rule is not enforced in the Fourth Circuit because of *Tabb Lakes*.[9]

The conflict between the Seventh and Ninth Circuits, on the one hand, and the Fourth Circuit, on the other, as to this important question should be resolved by this Court.

1. The Statutory Text

Neither the Corps nor EPA—nor, for that matter, any court—has ever maintained that the text of the CWA justifies the "migratory bird rule." The reason is that the words of the statute are restrictive, not open-ended, and do not support such a claim. The CWA expressly regulates the discharge of pollutants into "*navigable waters*" alone. 33 U.S.C. §§ 1311, 1342, 1344. Although that expression is later defined to mean "the waters of the United States" (33 U.S.C. § 1362(7)), and the Supreme Court has commented that this "makes it clear that the term 'navigable' as used in the Act is of limited import" (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)), as that Court impliedly recognized, this is far from altogether discarding the notion of navigability as the anchor for the legislation.

Indeed, the expression "waters of the United States," or a like term, had been used in legislation for more than a century to denote waters which, if not themselves navigable, were at least immediately connected to waterways useful for interstate or foreign commercial navigation.[10] Moreover, less than a

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[8] *See* Corps/EPA memo entitled "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (Jan. 29, 1990). A copy of that memorandum is attached hereto as Appendix A.

[9] Although the Corps and EPA in their January 24, 1990 memorandum promised to publish the "migratory bird rule" in accordance with the Administrative Procedure Act, such publication has never occurred.

[10] *See, e.g.*, Rivers & Harbors Act of 1894 § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895 § 2, 33 U.S.C. § 151; Rivers & Harbors Act of 1899 § 10,

decade before the 1972 enactment of the CWA, this Court observed that it is self-evident that the statutory expression "streams 'over which Congress has jurisdiction under its authority to regulate commerce'" reaches no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 97 (1965).

The CWA definition of navigable waters reflects a congressional intent to push back the *boundaries* of covered navigable waterways to include their non-navigable portions, their non-navigable tributaries, and their adjacent non-navigable wetlands. However, it does not allow the Corps or EPA, in their administration of the CWA, to ignore that the definition is of *navigable waters*, a term which simply cannot be stretched to embrace waters and wetlands that are themselves not navigable and have *no connection* to any navigable waterway.

If Congress had meant to throw overboard the concept of navigability as the constitutional premise for the legislation, it knew the formula. As long ago as the Federal Power Act of 1920, statutes had been written to reach activities "affecting" interstate or foreign commerce. *See* Federal Power Act § 23(b), 16 U.S.C. § 817, *construed in Federal Power Comm'n v. Union Electric Co.*, 381 U.S. at 93-99. Here, instead of asserting jurisdiction over all waters whose degradation would "affect" interstate commerce—a very broad category—Congress chose to limit itself to regulating discharges "in" "navigable waters." This is a critical distinction. *Cf. Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914).

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33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936 § 1, 33 U.S.C. § 701(a).

Discharges "in" or "into" navigable waters is confined geographically to what have been considered "federal" waters: a category of waters that have a distinct and well understood meaning. This is to be contrasted with the non-geographic and open ended concept of all waters that could "affect" interstate commerce.

There is good reason to construe the CWA as embracing only "federal" waters and their adjuncts. Federal legislation concerns itself with interstate navigable waterways, leaving local waters to state regulation. The fact that Congress relied upon specific Supreme Court precedents in defining the limits of the CWA (*see* n.12, *infra*) and the emphasis on *navigable* waters, leads to the conclusion that Congress believed it was exercising the federal power over water commerce—and nothing more. *This* is the power the legislators presumably wanted to take to *its* constitutional limit. There is not the remotest indication that they thought the "navigation" power would reach isolated non-navigable intrastate waters.

The fact is that the CWA on its face deals only with the waters whose pollution is federal business because they are closely related to interstate commerce. As in earlier legislation,[11] adjacent waters, including non-navigable tributaries and abutting wetlands, are included. But there is no ground for reading "waters of the United States" to encompass non-navigable waters or wetlands wholly isolated from interstate waterbodies and unconnected to the federal water system.

2. Legislative History

The oft-cited equation between the reach of the CWA and constitutional limits derives from a misreading of the Act's

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[11] *E.g.*, Act of June 29, 1888 § 1, 33 U.S.C. § 441 ("tributary waters" of New York Harbor); Rivers & Harbors Act of 1899 § 13, 33 U.S.C. § 407 ("any tributary of any navigable water"); Pub. L. 85-500, § 104, 33 U.S.C. § 610 ("navigable waters, tributary streams, connecting channels, and other allied waters"). *See also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-710 (1899).

legislative history. In truth, Congress never suggested that the CWA would go to the constitutional limit. What in fact was said was something very different: that the phrase "*navigable waters*" was to be given "the broadest possible constitutional interpretation." S. Conf. Rep. 1236, 92nd Cong. 2d Sess. 144 (1972); 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie); *see also Leslie Salt Co. v. Froehlke*, 578 F.2d at 755.

No doubt, Congress meant to embrace all waters that could be reached under its Commerce Clause *power to regulate water commerce*, i.e. navigable waters, actual and potential, together with their "adjuncts." But there is not the slightest hint that Congress meant to invoke *other* Commerce Clause powers—unrelated to water commerce—to regulate isolated non-navigable waters. It is significant that, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court eschewed the easy path to its result—that Congress meant to go to the constitutional limit—and, instead, parsed at some length the legislative history of both the 1972 statute and the 1977 amendments in arriving at the expressly limited conclusion that wetlands immediately adjacent to, and inundated by, a fully navigable waterway were within the ambit of the CWA. *See id.* at 124, 130-132, 135, 136-138.

The legislative history of the CWA fully confirms that navigability was the touchstone of coverage. It is true that Congress intended to define the covered waters "broadly," going beyond the "classical" or "traditional" tests followed under earlier water pollution control legislation. *E.g.*, 118 Cong. Rec. 33757 (1972). But this only meant including the non-navigable "portions" and "tributaries" of actually or potentially navigable watercourses—as the repeated invocation of cases so holding indicates. *E.g.*, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (1972) (statement of Senator Muskie).[12] Never

[12] The decisions of the Supreme Court referred to in the legislative history which were intended to reflect the limits of the CWA are *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427

was there any expression of intent to regulate waters that are not physically a part of or connected to navigable waters. From first to last, the preoccupation was with navigability, and the ultimate refusal to meaningfully define the term exhibits no more than a fear that any words used might be read too narrowly. It is quite unreal to suggest that, without saying so, those who struggled so long over the way to define navigability meant to cast aside the concept and reach any waters which could be linked with commerce in a wholly different way.

It is obvious that the drafters of the CWA never contemplated that it could be stretched to include isolated waters on the basis of the presence of migratory birds. In the many thousands of pages of legislative history leading to the enactment of the law in 1972 (and its revision in 1977), no one ever suggested such a ground for coverage. As we shall discuss, the idea was not thought of until Congressional oversight hearings in 1985.

Given the practical consequences of the many millions of acres of lands throughout the United States becoming subject to federal regulation under this rule, as well as the novelty of the migratory bird theory itself, it would be remarkable if this expansive theory of jurisdiction would have been accepted by all members of Congress without mention. In sum, the legislative history of the CWA undercuts the claim that isolated, non-navigable waters were ever intended to fall within the reach of the CWA, much less on the theory that their only connection with interstate commerce is the flight of migratory birds.

3. Administrative Construction

Cargill submits there is no room for reading into the CWA a license to regulate non-navigable isolated waters frequented by migratory birds. Such a radical extension of coverage is

(1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941).

well beyond any reasonable construction of the Act, and, accordingly, cannot be vindicated by invoking deference to the administrators' interpretation of the statute.[13] This view is confirmed by the failure of the implementing agencies (the Corps and the EPA) to "discover" the new basis for jurisdiction until more than thirteen years after the CWA was enacted. Under such circumstances, it is especially difficult to indulge any presumption in favor of administrative construction,[14] and strongly suggests, not legitimate interpretation, but creative law-making by an agency with no such delegated authority.

We are not dealing with a relatively inconsequential detail: predicating CWA jurisdiction over isolated waters on the presence of migratory birds brings tens of millions of acres under regulation for the first time, at least potentially banning all residential, agricultural, commercial or industrial use of the sites. This is not a matter that could have escaped the attention of the legislators and administrators for so long. The existence of such isolated wet areas—especially prairie potholes and other isolated freshwater wetlands—and their importance to migratory birds, was well-known, and had been the focus of special protective legislation, typically providing for the *purchase* of relevant sites or appropriate easements.[15]

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[13] *See Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990); *Sullivan v. Zebley*, 493 U.S. 521, 527 (1990); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 207, 212-213 (1988); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516-517 (1988); *Martin v. Refrigeration School*, 968 F.2d 3, 7-8 (9th Cir. 1992); *Arizona Electric Power Co-Op, Inc. v. United States*, 816 F.2d 1366, 1375-1376 (9th Cir. 1987). *See Chevron USA v. NRDC*, 467 U.S. 837, 842-844 (1984).

[14] *See Bowen v. Georgetown University Hosp.*, 488 U.S. at 211-213. *See also Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n.34 (1986); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

[15] Statutes enacted to this end include: Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755, 16 U.S.C. § 703, *et seq.*; Bear River Migratory Bird Refuge Act of Apr. 23, 1928, ch. 413, 45 Stat. 448, 16 U.S.C. § 690, *et seq.*; Migratory Bird Conservation Act of Feb. 18, 1929, ch. 3657, 45 Stat. 1222, 16 U.S.C. § 715, *et seq.*; Cheyenne Bottoms Migratory Bird Refuge Act of June 12, 1930, ch. 469, 46 Stat. 579, 16

In this setting, then, it is not possible to reasonably construe the 1985 decision to reach these areas under the CWA as merely the belated revelation of a previously unrecognized truth.

Also instructive is how the decision came to be made. The Corps had initially read the CWA as embracing no more than those navigable waters and their adjuncts that were subject to the federal navigational servitude.[16] Only under compulsion of a court decree in *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), did the Corps rewrite its regulations to reach any isolated waters. *See* 1975 Corps Regulations, 40 Fed. Reg. 31320, *et seq.* (1975) The new regulations barely survived Congressional scrutiny. *See Riverside*, 474 U.S. at 135-137. More to the point, there was as yet no suggestion that bird use alone would trigger "isolated waters" jurisdiction.

It was only in 1985, during hearings before a Senate Subcommittee, where the EPA, followed by the Corps, first suggested the "migratory bird rule." *See* "Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works," 99th Cong., 1st Sess. 168, 169-170, 189-190, 212 (1985). And then, the Corps

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U.S.C. § 691, *et seq.*; Migratory Bird Hunting Stamp Act of Mar. 16, 1934, ch. 71, 48 Stat. 451, 16 U.S.C. § 718, *et seq.*; Migratory Waterfowl & Other Wildlife Refuge in Cal. Act of May 18, 1948, ch. 303, 62 Stat. 238, 16 U.S.C. § 695, *et seq.*; Migratory Bird Hunting Stamp Act Amendments of Aug. 1, 1958, Pub. L. 85-585, 72 Stat. 486, 16 U.S.C. § 718(b) & (c); Wetlands Act of Oct. 4, 1961, Pub. L. 87-383, 75 Stat. 813, 165 U.S.C. § 7152k-3, *et seq.*; Endangered Species Act of Dec. 28, 1973, Pub. L. 93-205, 87 Stat. 884, 16 U.S.C. § 1531, *et seq.*; Wetlands Loan Extension Act of Feb. 17, 1976, Pub. L. 94-215, 90 Stat. 189, 16 U.S.C. § 715; Emergency Wetlands Resources Act of Nov. 10, 1986, Pub. L. 99-645, 100 Stat. 3582, 16 U.S.C. § 3901, *et seq.*

[16] *See* "Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation," 94th Cong., 1st Sess. 29 (1975). *See also id.* at 5, 6, 34.

adopted the "migratory bird rule" by a procedure that precluded public scrutiny, depriving the agency of the benefit of public comments. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989).[17] This is not the hallmark of a change of position that merits deference because it results from the "well-considered" judgment of an expert agency, carefully rethinking the import of the statute during "a detailed and comprehensive process," and altering its view based on its expertise and in light of its experience in administering the contested provision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-356 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

B. THE MIGRATORY BIRD RULE EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

It is settled that a court should avoid reaching any constitutional question if at all possible. Unless it is unambiguously clear that Congress has directed, or authorized, an agency to cross over into territory where serious doubts arise, the statute should be construed so as to make unnecessary a resolution of the constitutional issue. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 74, 78, 82 (1982); *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

It seems quite plain that the CWA reasonably could be read *not* to authorize the "migratory bird rule." This is the conclusion of the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which invalidated the very regulation (33 C.F.R. § 328.3(a)(3)) the migratory bird rule is said to "interpret."

To interpret the CWA as supporting the "migratory bird rule" is subject to two constitutional infirmities. The first,

[17] It has never been incorporated into a regulation—appearing only in the published preface to the Corps' 1986 regulations. *See* 51 Fed. Reg. 41217 (1986).

which we discuss now, is that the rule oversteps the boundaries of the Commerce Clause. The second, to be discussed in Section C, below, is the constitutional impropriety of a congressional delegation of power so wide and unconfined that it purports to authorize the agencies administering the law to extend the coverage of the statute well beyond anything contemplated by Congress.

Because the migratory birds covered by the rule expressly include species not covered by treaties (*see* 51 Fed. Reg. 41217 (1986), category (b)), the Commerce Clause is necessarily the constitutional power relevant here. Although some may argue that there are *no* limits to the reach of the Commerce Clause, provided only some "effect" on interstate or foreign commerce can be found—no matter how trivial or indirect—that is not the law. This was made clear by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). The true rule is that a "relatively trivial impact on commerce" will not serve as "an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 305 (Burger, C.J., concurring), 310-312 (Rehnquist, J., concurring) (1981). Accordingly, the first question here is whether the "migratory bird rule" regulates any activity that would have a "substantial" effect on interstate commerce. *See Maryland v. Wirtz*, 392 U.S. at 189.

As written and as applied, the rule requires no showing whatsoever that the presence of migratory birds on a site has attracted out-of-state human visitors—whether bird watchers or duck hunters. And, indeed, in the case of small "ponds" of no scenic value, used by very common varieties of birds, it is unlikely that the occasional presence of wildfowl will have any measurable effect on human travel interstate. For example, in Cargill's case now pending in the Ninth Circuit, the site in question is inaccessible to the public, including the Plaintiffs. Nor does the rule require that the migratory birds on which jurisdiction is predicated are species which are ever

bought and sold, whether for food or as pets or otherwise. *See Lopez*, 514 U.S. at 561 (observing statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the [activity sought to be regulated] affects interstate commerce").[18] Thus, the claim for a link with interstate commerce depends entirely on the movement of the birds themselves. We doubt that this can ever qualify as a "substantial" effect on interstate commerce.

The ultimate question is whether the self-determined flight of birds is "commerce" in the constitutional sense. If not, an activity that indirectly bears on the migration of birds does not, on that account, "affect interstate commerce" and cannot be regulated under the Commerce Clause. Certainly, common usage does not encompass an animal migration, independent of human forces—and, therefore, divorced from any "commercial" motive—as an aspect of "commerce."

It has been held that pursuant to its Commerce Clause power, Congress can ban the interstate transportation of protected bird parts (*Andrus v. Allard*, 444 U.S. 51 (1979)), and that state impediments to the interstate shipment of minnows are within the ambit of the clause. *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Maine v. Taylor*, 477 U.S. 131 (1986). But no Supreme Court decision goes so far as to suggest that fish swimming under their own power across a

[18] While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," this Court has said that as part of its "independent evaluation of constitutionality under the Commerce Clause [it] of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Lopez*, 514 U.S. at 562-563. As was the case in *Lopez*, such findings are lacking here. Neither the text of the CWA (*see* Section A.1, *supra*), nor its relevant legislative history (*see* Section A.2, *supra*), contains any mention of the purported effects on interstate commerce claimed by the Corps to support the "migratory bird rule." *Compare National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1050-1051, 1056-1057 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (*citing* legislative and congressional committee findings of effects on interstate commerce in upholding against *Lopez* Commerce Clause challenge application of ESA to fly species with habitat located entirely within an 8-mile radius in California).

state boundary, or birds in free flight crossing an interstate line, are engaged in "commerce between the States." Plainly, neither *Andrus v. Allard* nor *Hughes v. Oklahoma*, involving the human-initiated transportation of captive species, speaks to this question.[19] Nor does *Missouri v. Holland*, 252 U.S. 416 (1920), which relied entirely on the Treaty Clause to vindicate the Migratory Bird Treaty Act of 1918. *See id.* at 432-435. The total absence of any Supreme Court precedent is attested by remarks from the Court during the oral argument of the *Riverside* case.[20]

[19] The United States, in the *Leslie Salt* cases, has invoked a passage in *Allard*, treating as "clearly flawed" the "assumption that the national commerce power does not reach migrating wildlife." *Allard*, 444 U.S. at 63 n.19. But that was said in reference to the sale of such birds—obviously not the case here.

It is worth noting that in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), the Supreme Court did not speak of fish migrating across state lines as an aspect of "interstate commerce," but stressed, instead, the "movement of vessels from one State to another in search of fish, and back again to processing plants" as an "activity which Congress could conclude affects interstate commerce." *Id.* at 282.

[20] The dialogue was as follows (Transcript of Oral Argument in Supreme Court No. 84-701):

QUESTION [by Justice White]: But it would be your view that an isolated wetland that provided refuge for birds would be enough for Corps of Engineers jurisdiction?

ANSWER [by Ms. Oberly, Government Counsel]: If they were migratory birds, yes.

Q: If there was an aerial connection, as you say.

A: Yes.

(General laughter.)

Q: Is the movement of birds interstate commerce?

A: It can — Yes.

Q: What case do you rely on?

A: Missouri versus Holland would be an example.

Q: That was a treaty power case.

A: It is a treaty power case, but I think it demonstrates the importance—

Q: Well, it demonstrates the treaty power.

A: North Dakota—United States versus North Dakota. I may have it backwards. I think it is North Dakota versus United States, which dealt with prairie potholes in North Dakota as important breeding

Justice Thomas, in his dissent to the denial of Cargill's petition to this Court following the *Leslie II* decision, aptly opined that "the basis asserted [the "migratory bird rule"] to create federal jurisdiction over Petitioners' land in this case seems to me to be more far-fetched than that offered, and rejected, in *Lopez*." *Cargill, Inc. v. United States*, 516 U.S. 955, 957-958 (1995).

C. THE MIGRATORY BIRD RULE IS UNCONSTITUTIONAL AS RESULTING FROM AN EXCESSIVE DELEGATION OF LEGISLATIVE POWER

Neither the Government nor the courts have ever straightforwardly asserted that the Congress that enacted the CWA in 1972 intended to reach isolated waters and wetlands used by migratory birds. In light of the statutory text and the legislative history, that would be a most difficult proposition to maintain. Instead, the argument seems to be that Congress wholly abdicated its defining function, eschewing any decision as to what effects on interstate commerce would justify federal regulation of local waters, and left the administering agencies entirely free to search out, from time to time, the constitutional limits of geographic jurisdiction, relying on the judiciary, if and when called upon, to curb any overstepping of the Commerce Clause. To say the least, there

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grounds for migratory waterfowl. That was a statutory construction case. But I think the Court has recognized in quite a few cases that—

Q: That the migration of birds is interstate commerce?

(General laughter.)

A: That it can be. If—

Q: Well, what—in what cases—

A: Duck hunters.

Q: In what cases have we recognized that?

A: I may be unable to give you a case, Your Honor, but I would suggest that duck hunters, interstate travelers who go to wildlife refuges to view ducks, migratory ducks who come from out of state, all of that together combines to make not just the birds alone but the viewing of the birds and —

Q: It has an effect.

A: It has an effect sufficient to constitute a connection with interstate commerce.

are substantial problems with this scenario. In fact, in its appellate briefs in the *Tabb Lakes* case, the United States was at pains to assert—correctly, in our view—that the CWA grants no quasi-legislative power to the Corps, which would permit the agency, through "substantive" regulations, to expand the statutory coverage. *See* Brief of the United States Appellant at 21-23, and Reply Brief for the United States at 2, 8-10, *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866.

Even assuming Congress itself might have directly enacted the "migratory bird rule," there must be a serious question whether it could accomplish the same result by a sweeping delegation of legislative power "not canalized within banks that keep it from overflowing," but "unconfined and vagrant." *See Schechter v. United States*, 295 U.S. 495, 551 (1935) (Cordozo, J., concurring). There are surely some limits on the practice of resolving legislative differences, or drafting difficulties, by leaving it to the administrators to make all the hard choices. At least, it seems excessive to authorize an agency to do anything that will withstand constitutional scrutiny--without even remotely suggesting what those boundaries might be. *See* L. Tribe, *American Constitutional Law*, 362-368, 1677-1682 (2d ed. 1988). Here, we do not have an expression by Congress in the statute itself that invests the implementing agencies with the authority to expand their jurisdiction to the constitutional limit. Nor do we have the benefit of any criteria or standards that would guide the agencies in that endeavor. Such a total absence of Congressional delegation and guidance surely raises serious and, Cargill submits, fatal constitutional infirmities.

The CWA contains even less legislative guidance to the implementing agencies with respect to defining the reach of "waters of the United States" than the Clean Air Act provisions found to constitute an impermissible delegation in *American Trucking Association, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *order on reh'g* 195 F.3d 4 (D.C. Cir. 1999). It is worthy of note that the Government, in its Petition to this

Court for review of *American Trucking* (*see* Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in *Browner v. American Trucking Association, Inc.*, No. 99-1257 (Jan. 2000) at 14), relies upon the availability of the Administrative Procedure Act rulemaking process to save portions of the Clean Air Act from being struck down as an impermissible delegation to EPA. However, here, the "migratory bird rule"—despite its moniker—is not the product of the notice-and-comment rulemaking prescribed by the Administrative Procedure Act (*see* 5 U.S.C. § 553) or by rulemaking procedures specified by the CWA. Consequently, even this theory cannot save the "migratory bird rule."

There is another concern. If the Commerce Clause properly can be invoked to reach isolated waters frequented by migratory birds, it must be by taking the commerce power to its outer limit. That might be justified in deference to the judgment of Congress, whose findings with respect to effect on interstate commerce are entitled to respect. *E.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 303-305 (1964); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276-277; *Metro Broadcasting v. FCC*, 497 U.S. 547, 563-566 & nn.11-13 (1990). The Constitution entrusts the legislative branch with the task of assessing the need for national regulations of "commerce . . . among the several States." U.S. Const. art. I, § 8, ch. 3. But it does not follow that an administrative agency, acting without an explicit Congressional mandate, is equally free to exercise constitutional power to the same boundary.

Whatever deference is due Congress' constitutional determination, based on full legislative consideration, no such deference operates in favor of implementing agencies whose "expertise" and practical experience may, under some circumstances, justify deference to their reading of statutes, but not the Constitution. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-104, 114-116 (1976); *Greene v. McElroy*,

360 U.S. 474, 507 (1959). *Cf. Flores v. Meese*, 942 F.2d 1352, 1362 (9th Cir. 1991); *Ayala-Chavez v. INS*, 945 F.2d 288, 294 (9th Cir. 1991). Without the benefit of such a presumption, we submit the "migratory bird rule" cannot pass the constitutional test.

CONCLUSION

The decision of the Court of Appeals should be reversed.

DATED: March 2000

Respectfully submitted,

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DEPARTMENT OF THE ARMY
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16 JAN 1990

REPLY TO ATTENTION OF:

CECW-OR

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

United States Environmental Protection Agency

United States Department of the Army

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes* v. *United States*

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes* v. *United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this

interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes*, and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to the procedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters "...prairie potholes, wet meadows, [and] playa lakes...", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated

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waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

JOHN P. ELMORE — Date: 1/24/90
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental Protection Agency:

DAVID G. DAVIS — Date: 1-19-90
Director
Office of Wetlands Protection

Supreme Court, U.S.
FILED
JUL 27 2000

(13)

No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Counsel for Petitioner

QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intra-state waters solely because those waters do or potentially could serve as habitat for migratory birds.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the Solid Waste Agency of Northern Cook County, a municipal corporation created by intergovernmental agreement under the laws of Illinois. Its member communities are the cities and villages of Arlington Heights, Barrington, Buffalo Grove, Elk Grove Village, Evanston, Glencoe, Glenview, Hoffman Estates, Inverness, Kenilworth, Lincolnwood, Morton Grove, Mt. Prospect, Niles, Palatine, Park Ridge, Prospect Heights, Rolling Meadows, Skokie, South Barrington, Wheeling, Wilmette, and Winnetka. Petitioner has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondents are the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency; Arthur Williams, Lieutenant General, Chief of Engineers, U.S. Army Corps of Engineers; Robert E. Slockbower, Lieutenant Colonel, Chicago District Engineer, U.S. Army Corps of Engineers; Togo D. West, Jr., Secretary of the Army; Carol M. Browner, Administrator, U.S. Environmental Protection Agency; and intervenors below, the Village of Bartlett and Citizens Against the Balefill.

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Aluminum Co. v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) 36

Andrus v. *Allard*, 444 U.S. 51 (1979) 39

Babbitt v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995) 31

BankAmerica Corp. v. *United States*, 462 U.S. 122 (1983) 36

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Central Bank v. *First Interstate Bank*, 511 U.S. 164 (1994) 26

Chamber of Commerce v. *FEC*, 69 F.3d 600 (D.C. Cir. 1995) 32

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Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 24

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Davis v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989) 16

Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 29

Donnelly v. *United States*, 228 U.S. 243 (1913) 15, 18

Douglas v. *Seacoast Prods.*, 431 U.S. 265 (1977) 39

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 14, 26, 27

EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 36

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 33

FDA v. *Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000) 18

Federal Maritime Comm'n v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) 33

Federal Power Comm'n v. *Union Elec. Co.*, 381 U.S. 90 (1965) 20

Federal Reserve Bd. v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) 19

FERC v. *Mississippi*, 456 U.S. 742 (1982) 29, 41

FTC v. *Bunte Bros.*, 312 U.S. 349 (1941) 29

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Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 33

Gemsco, Inc. v. *Walling*, 324 U.S. 244 (1945) 24

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 45, 46

Granderson v. *United States*, 511 U.S. 39 (1994) 32

Greene v. *McElroy*, 360 U.S. 474 (1959) 46, 48

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 14, 28

GTE Service Corp. v. *FCC*, No. 99-1244 (cert. granted June 5, 200) 32

Guardians Ass'n v. *Civil Serv. Comm'n*, 463 U.S. 583 (1983) 33, 46

Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974) 17, 40, 41

Hagen v. *Utah*, 510 U.S. 399 (1994) 24

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 48

Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 29

Hoffman Homes, Inc. v. *EPA*, 961 F.2d 1310 (7th Cir. 1992), on rh'g, 999 F.2d 256 (7th Cir. 1993) 20

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International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) 26

Jones v. *United States*, 120 S. Ct. 1904 (2000) ..... *passim*

Jones v. *United States*, 526 U.S. 227 (1999) 27

Kent v. *Dulles*, 357 U.S. 116 (1958) 46, 48

Lake Country Estates, Inc. v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) 29

Leovy v. *United States*, 177 U.S. 621 (1900) 16, 27

Leslie Salt Co. v. *United States*, 55 F.3d 1388 (9th Cir.), cert. denied, *Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) 27

Loving v. *United States*, 517 U.S. 748 (1996) 46

Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 33

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 40, 41

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) .. 16

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) .. 40

Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 19

Missouri v. *Holland*, 252 U.S. 416 (1920) 39, 48, 49

Mistretta v. *United States*, 488 U.S. 361 (1989) 34

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National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974) 46, 48

Neely v. *Henkel*, 180 U.S. 109 (1901) 48

NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 27

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 48

North Dakota v. *United States*, 460 U.S. 300 (1983) . 39, 49

NRDC v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975) 34

Palmer v. *Massachusetts*, 308 U.S. 79 (1939) 28

Perez v. *United States*, 402 U.S. 146 (1971) 40

Perry v. *Haines*, 191 U.S. 17 (1903) 16

Printz v. *United States*, 521 U.S. 898 (1997) 43

Railroad Co. v. *Maryland*, 88 U.S. (21 Wall.) 456 (1874) 15

Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 32

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 17

Reno v. *Koray*, 515 U.S. 50 (1995) 36

Rewis v. *United States*, 401 U.S. 808 (1971) 23, 28

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) ... 28

TABLE OF AUTHORITIES—Continued

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SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 24

Sullivan v. *Everhart*, 494 U.S. 83 (1990) 32

Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991) 45

Tabb Lakes, Ltd. v. *United States*, 715 F. Supp. 726 (E.D. Va 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (mem.) 35

The Abbotsford, 98 U.S. (8 Otto) 440 (1878) 16

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The Montello, 78 U.S. (11 Wall.) 411 (1870) 15

United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) 15

United States v. *Bass*, 404 U.S. 336 (1971) 28

United States v. *Darby*, 312 U.S. 100 (1941) 40

United States v. *Five Gambling Devices*, 346 U.S. 441 (1953) 27, 40

United States v. *George*, 228 U.S. 14 (1913) 34

United States v. *Jin Fuey Moy*, 241 U.S. 394 (1916) . 26, 27

United States v. *Lopez*, 2 F.3d 1342 (5th Cir. 1993), aff'd, 514 U.S. 549 (1995) 46

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United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *Morrison*, 120 S. Ct. 1740 (2000) .. *passim*

United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 17

United States v. *Oregon State Med. Soc.*, 343 U.S. 326 (1952) 45

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... *passim*

United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) 31

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 18, 27

U.S. West, Inc. v. *FCC*, 182 F.3d 1224 (10th Cir. 1999) 32

Utah v. *United States*, 403 U.S. 9 (1971) 15, 23

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 29

Warth v. *Seldin*, 422 U.S. 490 (1975) 29

Western Union Tel. Co. v. *Lenroot*, 323 U.S. 490 (1945) 18

Yonkers v. *United States*, 320 U.S. 685 (1944) 40

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Constitutions, Statutes, Ordinance, and Regulations:

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Emergency Wetlands Resources Act, 16 U.S.C. § 3901 ..... 48, 49

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33 U.S.C. § 1343 19

33 U.S.C. § 1344 ..... *passim*

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Migratory Bird Hunting Stamp Act,
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Migratory Bird Treaty Act, 16 U.S.C. § 703 ..... 48, 49

North American Wetlands Conservation Act,
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Northwest Ordinance art. IV (1787) 15

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Illinois Environmental Protection Act:

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Ill. Stat. Ch. 111 ½ § 1011(b) (1988) 6

Ill. Stat. Ch. 111 ½ § 1039 (1988) 6

Illinois Groundwater Protection Act,
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Illinois Interagency Wetlands Policy Act,
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Illinois Natural Areas Preservation Act,
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Illinois Solid Waste Management Act,
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Illinois Solid Waste Planning and Recycling Act,
415 ILCS 15 (1998) 3, 5

Cook County Zoning Ordinance (1976) 5

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33 C.F.R. § 328 2

40 C.F.R. § 230 ..... 2, 9

39 Fed. Reg. 12,050 (Apr. 3, 1974) 34

40 Fed. Reg. 31,319 (July 25,1975) 34

42 Fed. Reg. 37,122 (July 19,1977) 24, 26, 35

51 Fed. Reg. 41,206 (Nov. 13, 1986) ..... *passim*

58 Fed. Reg. 45,008 (Aug. 25, 1993) 38, 45

61 Fed. Reg. 65,874 (Dec. 13, 1996) 23

64 Fed. Reg. 47,175 (Aug. 30, 1999) 23

35 ILL. ADMIN. CODE PART 620 (1997) 6

35 ILL. ADMIN. CODE PART 870 (1997) 3

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35 ILL. ADMIN. CODE § 807.201 (1988) 6

Miscellaneous:

Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1 (1999) 29, 30, 43

V. ALBRECHT & B. GOODE, WETLAND REGULATION IN THE REAL WORLD (1994) 38

THE ATLAS OF BIRD MIGRATION (ed. J. Elphick 1995) ... 42

Brown, *It's Already Spring*, BOSTON GLOBE, Mar. 1, 1998, at 1 44

Bulkeley, *As a Work of Art, Windsor Chair Gets a Standing Ovation*, WALL ST. J., Aug. 15, 1997, at A1 44

Bullwinkel, *Environmental Law—The Uneasy Accommodation Between State and Federal Agencies*, 25 DEPAUL L. REV. 423 (1976) 30

Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271 (2000) 43

Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998) 40

TABLE OF AUTHORITIES—Continued

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Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93 (1985) 43

EPA, GUIDANCE FOR CORPS AND EPA FIELD OFFICES REGARDING CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF UNITED STATES V. JAMES J. WILSON (May 29, 1998) 35

EPA, Memorandum from F. Blake to R. Sanderson (Sept. 12, 1985) 35

Ginsberg & Harsch, *The National Pollutant Discharge Elimination System in Illinois: The State Assumes Direct Authority*, 27 DEPAUL L. REV. 739 (1978) 30

H.R. 3199, 95th Cong. § 16 (1977) 25

H.R. 11896, 92d Cong. § 502 (1972) 21

H.R. REP. NO. 92-911 (1972) 21

Hobby Indus. Ass'n, *1996-1997 Size of Craft/Hobby Industry Study, Executive Summary*, <www.hobby.org/size.html> 44

Holman, Note, *After* United States *v.* Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139 (1995) 41, 42

Illinois Department of Natural Resources, <http://dnr.state.il.us/dnrorg.htm> 7

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ILLINOIS EPA, AVAILABLE DISPOSAL CAPACITY FOR SOLID WASTE IN ILLINOIS (1987) 3

Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. 95-14 (1978) 25

Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1 (1973) 22, 23

Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998) 38, 41

National Governors' Association, *Policy NR-3, Water Resource Management*, <http://www.nga.org.pubs/policies/nr/nr03.asp> 29

Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works, 99th Cong. 168 (1985) 35

R. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY (1992) 49

R. PETERSON, A FIELD GUIDE TO BIRDS (4th ed. 1980) ... 42

S. 2770, 92d Cong. § 502 (1971) 21

TABLE OF AUTHORITIES—Continued

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S. CONF. REP. NO. 92-1236 (1972) 21

Strand, *Federal Wetlands Law: Part III*, 23 ENVTL. L. REP. 10,354 (1993) 49

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) 33, 46, 47

U.S. Army Corps of Engineers, *Report to Congress on the Impact of a Proposed Municipal Landfill (Balefill) on the Newark Valley Aquifer* (Apr. 1990) 10

United States v. *Lopez*, No. 93-1260, Brief for the United States (June 2, 1994) 46

United States v. *Riverside Bayview Homes, Inc.*, No. 84-701, Tr. of Oral Argument (Oct. 16, 1985) 47

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. Justice Stevens extended the time for filing the petition for certiorari to January 14, 2000. The petition was filed on that date and granted on May 22, 2000. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause provides that "Congress shall have the Power * * * [t]o regulate Commerce with foreign nations and among the several States." U.S. CONST. art. I, § 8.

Relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act" or "CWA") are reproduced at Pet. App. 37a-38a. The "other waters" regulation and "migratory bird rule" are set forth at Pet. App. 39a-40a.

Of particular relevance here, CWA § 101(b) declares that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b).

STATEMENT

The Clean Water Act prohibits "any person" from discharging "any pollutant," including "dredged or fill material," into "navigable waters" without obtaining a permit from the U.S. Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps has by regulation defined the "waters of the United States" to include not only waters that are or could be used for navigation, tidal waters, interstate waters, tributaries

of jurisdictional waters, and wetlands adjacent to jurisdictional waters (33 C.F.R. § 328.3(a)), but also

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce * * *.

Id., § 328.3(a)(3) (the "other waters rule"); see also 40 C.F.R. § 230.3(s) (EPA's essentially identical regulation).

In the *preamble* to Clean Water Act regulations promulgated in 1986, the Corps further defined these "other" waters:

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * *.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This "migratory bird rule" is at issue here. Petitioner Solid Waste Agency of Cook County (SWANCC) contends that the Clean Water Act does not, and constitutionally may not, authorize federal jurisdiction over isolated, intrastate, water-filled trenches and depressions located on SWANCC's land solely because they provide habitat for migratory birds.

A. The Solid Waste Agency's Balefill Project

SWANCC comprises 23 suburban Chicago cities and villages located in north and northwest Cook County, Illinois. Members of the Northwest Municipal Conference pursuing "a comprehensive action plan for regional solid waste disposal" formed SWANCC in 1988 as a Municipal Joint Action Agency under Illinois law. AR 15-17, 44682-83.[1] The Illinois Solid

[1] "AR" refers to the Administrative Record before the Corps. The Corps' July 1994 decision denying SWANCC's revised Section 404 permit application is set out at AR 15572-15847. The Corps' January 1991 decision denying SWANCC's prior application is at AR 44682-44743. Copies of both decisions have been lodged with the Clerk. SWANCC's revised permit application is at AR 1-1492, 1751-2113.

Waste Planning and Recycling Act "encourage[s]" such "intergovernmental cooperation agreements whereby various units of local government within a region determine the best methods and locations for disposal of solid waste." 415 ILCS 15/2(5).

SWANCC is charged with the cost-effective and environmentally sound management of non-hazardous solid waste for the 700,000 people in its member communities. To that end, SWANCC adopted what the Corps called "an admirable plan" to manage waste for 20 years, emphasizing waste volume reduction, recycling, composting, and other means to divert 40-45 per cent of solid waste from disposal in compliance with the Solid Waste Planning and Recycling Act (415 ILCS 15) and Illinois Environmental Protection Agency rules (35 ILL. ADMIN. CODE Part 870). AR 17, 44683-86.

Nevertheless, in light of diminishing landfill capacity in the region, which was "reaching a critical level," SWANCC also needed to develop a new landfill.[2] Pet. App. 2a; AR15-17, 44684-85. Accordingly, SWANCC purchased land to create a balefill—a landfill for disposal of baled, non-hazardous waste. SWANCC's proposed balefill would "only accept [municipal] waste [from SWANCC communities] that has been compacted and baled at [SWANCC-owned] transfer stations to be constructed in northwest Cook County." AR 18, 725, 747, 15576,

[2] Illinois law recognizes that landfills "continue to be necessary," that "landfill capacity is decreasing," and that siting new landfills "is very difficult due to the public concern and competition with other land uses." Illinois Solid Waste Management Act, 415 ILCS 20/2(2), (3), (10)(b). See ILLINOIS EPA, AVAILABLE DISPOSAL CAPACITY FOR SOLID WASTE IN ILLINOIS 14 (1987) ("facility sitin[g] can elicit an emotional response * * *. The 'not in my back yard' or NIMBY syndrome has become a prevalent sentiment"), AR 45.

44683-84; Pet. App. 2a. SWANCC's costs for this project exceeded $16 million by 1992. AR 5535.

B. The Balefill Site

Of the 533-acre parcel it purchased, SWANCC proposed to use 410 acres, located in Cook County, for the balefill. Almost 300 of those acres had been used for sand and gravel strip mining from the 1930s to the 1950s, which left alternating linear spoil ridges and excavation trenches across the land. An "early successional stage forest" developed on this part of the property after strip mining ended. The trenches and other depressions left by the mining formed permanent and seasonal ponds ranging from less than one-tenth of an acre to several acres in size and from several inches to several feet in depth. SWANCC's balefill project would require filling 17.6 acres of these "semi aquatic" areas. Pet. App. 2a-3a; AR 205.

"No Federally threatened or endangered species utilize the [balefill] site." AR 44713. The site does contain a large seasonal rookery of great blue herons—"locally appreciated" wildlife, the Corps concluded, that "adds to the aesthetic appeal of the region." AR 15700. Another "100-plus" bird species have been observed "nesting, feeding, or breeding at the site," including "water-dependent" and "migratory birds." Pet. App. 2a-3a.[3] Three species listed by the State of Illinois as threatened or endangered, which "use wooded nesting habitats in close proximity to water," have also been observed—the red-shouldered hawk, Cooper's hawk, and veery. AR 44709, 44713, 15578.

---

[3] The Corps identified at or near the site one or more examples of 13 migratory bird species "known to depend on aquatic environments for a significant portion of their life requirements": "the Great Blue Heron, Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird." AR 15578.

SWANCC proposed to mitigate the impact of the balefill on these birds at a cost exceeding $17 million. AR 15710. Its original plans called for filling 31 acres of ponds (AR 44706), but it modified the project to reduce fill to 17.6 acres. Pet. App. 3a; AR 15574. It proposed to create 17.6 acres of replacement waters on the site (AR 15711); relocate the heron rookery elsewhere on the property and, if that failed, to purchase for the public or improve another rookery in the region (AR 15697-98); phase construction over 15 years to minimize disturbance (AR 15704-06); enhance forest and waters that remained on the property; and acquire 258 acres of land adjacent to the site to create or improve forest habitat. AR 15701-02.

C. The Cook County Permitting Process

The Clean Water Act states "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). Cook County and the State of Illinois carefully exercised those traditional responsibilities in this case. In order to proceed with its balefill project, SWANCC had to obtain approvals from both the county and State, through two elaborate and laborious permitting procedures.

The Northwest Municipal Conference optioned the balefill site in 1985, before SWANCC came into existence. In accordance with Illinois law recognizing "the authority of units of local government in the siting of solid waste disposal facilities" (415 ILCS 15/2), the Conference applied to the Cook County Zoning Board of Appeals in 1987 for a special use planned unit development ("PUD") permit for the balefill. Factors considered by the Zoning Board in reviewing this application included effect on surrounding properties, need for the project, and whether the special use would "be detrimental to * * * the public health, safety, or general welfare." Cook County Zoning Ord. §§ 13.10-7, 9-4 (1976). After conducting 10 public hearings and compiling "by far the largest record of proceedings in [its] history," the Zoning Board recommended approval

of the permit. AR 48. The Cook County Board of Commissioners subsequently approved the PUD by a 75% majority. *Ibid.*

In January 1990, the County Board enacted an ordinance approving SWANCC's plans. AR 48, 724-727. The ordinance recited that SWANCC had filed satisfactory Domestic Water Protection and Home Value Guaranty Plans, had added more "environmental protections," and would "provide for perpetual post closure monitoring of the balefill." AR 742-725. It required SWANCC to contribute $1 million to a trust for each year the balefill accepts waste, to guarantee post-closure maintenance and remedial action. AR 726.

D. The Illinois EPA Permitting Process

SWANCC also had to obtain a landfill development permit from the Illinois EPA, required by the Illinois Environmental Protection Act (Ill. Stat. Ch. 111 ½ § 1039 (1988)) and Pollution Control Board Solid and Special Waste Management Regulations. 35 ILL. ADMIN. CODE § 807.201 (1988).

The Illinois EPA has a mandate "to restore, maintain and enhance" the "waters of the State" and "to assure that no contaminants are discharged" into those waters. Ill. Stat. Ch. 111 ½ § 1011(b) (1988).[4] It rejected SWANCC's first, 1988 permit application. In 1989, SWANCC submitted a revised, 1,700-page application. After additional public hearings, the Illinois EPA approved a development permit in November 1989, subject to 51 conditions relating to the construction, operation, and monitoring of the balefill. AR 50-51, 747-754.[5]

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[4] "[W]aters of the State" include those on SWANCC's property. See Ill. Stat. Ch. 111 ½ § 1003.56 (1988) (waters of the State are "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within * * * this State"). A "contaminant" includes "any solid * * * matter * * * from whatever source." *Id.* § 1003.06.

[5] Many conditions were to protect groundwater, over which the Illinois EPA has express statutory authority. Groundwater Protection Act, 415 ILCS 55 (1998); 35 ILL. ADMIN. CODE Part 620 (1997).

The agency specifically approved SWANCC's "closure and post-closure care plans." AR 750.

The Illinois EPA's "engineering judgment," certified to the Corps of Engineers under CWA § 401, 33 U.S.C. § 1341(1), was that SWANCC's project would not "caus[e] water pollution as defined in the Illinois Environmental Protection Act" if it was "carefully planned and supervised." AR 772, 6163. The Illinois EPA thus concluded that the balefill would not cause

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Ill. Stat. Ch. 111 ½ § 1003.55 (1988).

Subsequently, the Illinois Department of Conservation reviewed SWANCC's plans, including its plans to mitigate the impact of the balefill on wildlife. The Department reported to the Corps of Engineers that "adverse impacts on state listed species would be mitigated through the implementation of the mitigation plan" provided certain recommendations were followed, and that it was "satisfied" with SWANCC's "heron mitigation plan" in light of "the increasing number of rookeries statewide in recent years." AR 15586.[6]

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[6] The Illinois Nature Preserves Commission and Endangered Species Protection Board, which expressed some concerns about SWANCC's balefill to the Corps (AR 15587-89), are subdivisions of the Department of Conservation (now Department of Natural Resources), which approved the plan. Endangered Species Protection Act, 520 ILCS 10/6, 10/10 (1998); Natural Areas Preservation Act, 525 ILCS 30 (1998); Illinois Department of Natural Resources, <http://dnr.state.il.us/dnrorg.htm> (visited July 18, 2000); see 33 C.F.R. § 320.4(j)(3) (requiring the Corps to determine "the official state position").

E. The Corps Of Engineers' Assertion Of Jurisdiction

Because the balefill project called for filling trenches and depressions within the forested area of the site, the Northwest Municipal Conference twice requested rulings from the Corps as to whether it required a CWA Section 404 permit to discharge fill material into navigable waters. 33 U.S.C. § 1344(a). Responding to a "letter requesting a determination of [the Corps'] jurisdiction over the proposed balefill site," the Corps informed the Conference in April 1986 that "the proposed balefill site is not subject to our regulatory authority." AR 777, 34594. The Conference's second request for a determination of Corps' jurisdiction met with the same disclaimer of jurisdiction in March 1987. AR 779, 34598; Pet. App. 3a-4a, 16a.

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that a brief site visit resulted in the observation of migratory birds. AR 34611-13. In November 1987, the Corps "determined that the water areas of the abandoned gravel pit do qualify as 'waters of the United States,'" and were therefore within its "regulatory authority," based on "three criteria: (1) that the proposed balefill site has been abandoned as a gravel pit; (2) that the water areas and spoil piles have developed a natural character; and (3) that the water areas are used or could be used as habitat for migratory birds which cross state lines." AR 780. The first two criteria reflect the fact that the Corps does not claim authority over "pits excavated in dry land for the purpose of obtaining fill, sand, or gravel" unless the "excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." 51 Fed. Reg. 41,206, 41,217 (1986). The Corps' third criterion, applying its bird rule, was its sole basis for concluding that SWANCC's property includes waters of the United States.

F. The Corps' Denial Of A Section 404 Permit

Once the Corps claimed jurisdiction over the semi-aquatic areas of the balefill site based on the presence of migratory

birds, SWANCC could not proceed with its plans until it obtained a permit from the Corps under CWA Section 404.

Obtaining such a permit is a two stage process. First, pursuant to CWA Section 401 the Corps requires an applicant to provide a "State [certification] that the proposed discharge will comply with applicable provisions of State law," including "water quality standards." AR 781. That certification is generally "conclusive with respect to water quality considerations." 33 C.F.R. § 320.4(d). The Illinois EPA issued water quality certifications to SWANCC in November 1989 (AR 772-774) and again in December 1992. AR 6163-6164; *supra*, pp. 6-7.

Second, the Corps makes "an environmental assessment, and a determination of the project's impact on the public interest" (AR 782), weighing in its "public interest" determination such factors as "economics, aesthetics, general environmental concerns, * * * fish and wildlife values, * * * land use, * * * and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a); see *id.* § 320.4(b)-(r). Though the Corps purports to recognize that "primary responsibility for determining zoning and land use matters rests with state [and] local * * * governments," it declines to "accept decisions by such governments" where "there are significant issues" it deems "of overriding national importance" given "the degree of impact in [the] individual case." *Id.* § 320.4(j)(2).

SWANCC submitted a Section 404 permit application in February 1990 seeking to fill 31 acres of trenches and depressions. The Corps concluded that SWANCC's project "is not contrary to the public interest because [its communities] need a solid waste disposal facility" and "the project's reasonably foreseeable benefits outweigh its foreseeable detriments." The Corps nevertheless denied the permit on the grounds that the project did not satisfy guidelines set out at 40 C.F.R. Part 230 because the "site may not be the least damaging practicable alternative site" and the project "would contribute to significant degradation of the aquatic ecosystem." AR 44742.

SWANCC reapplied after significantly amending its proposal, reducing the fill to 17.6 acres and increasing mitigation. *Supra*, p. 5. In July 1994, the Corps denied the permit, now finding the balefill contrary to the public interest and Corps guidelines because (1) breaking up "a large contiguous forest" would cause "unmitigable" impacts to "area sensitive" birds, (2) SWANCC had "not conclusively demonstrated that this is the least environmentally damaging, most practicable alternative," and (3) SWANCC had not "conclusively demonstrated" that it and its member municipalities had "capacity to finance in perpetuity * * * long term maintenance responsibilities," which created an "unacceptable" risk of groundwater contamination. AR 15658-59.[7] The sole basis for jurisdiction stated in the decision was that "the water areas are used as habitat by migratory bird[s] which cross state lines." AR 15578.

G. The Decisions Below

Unable to proceed with its balefill, SWANCC brought this Administrative Procedure Act suit challenging the Corps' decision and the theory under which it asserted jurisdiction. The district court granted summary judgment to the Corps on the issue of jurisdiction. SWANCC dismissed its remaining claims and the court entered final judgment. Pet. App. 2a, 14a.

The Seventh Circuit affirmed. It first rejected SWANCC's argument that basing federal regulatory jurisdiction on migratory birds violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrower interpretation of "navigable" "waters of the United States." Pet. App. 5a-9a. The court acknowledged that the migratory bird rule can be justified, if at all, only as "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a. It then

[7] The Corps previously had reported to Congress that the balefill would pose "virtually no risk" to groundwater. U.S. Army Corps of Engineers, *Report to Congress on the Impact of a Proposed Municipal Landfill (Balefill) on the Newark Valley Aquifer* 2 (Apr. 1990), AR 38316-38337, 41401 (lodged with the Clerk).

held that although the Corps had made no showing that the use of SWANCC's land by migratory birds had any effect on interstate commerce, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a. Finally, the court held that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." *Id.* at 7a.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court held that "the Act reaches as many waters as the Commerce Clause allows." Accordingly, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds," the Corps' interpretation of the Act was "reasonable." Pet. App. 9a-10a.

SUMMARY OF ARGUMENT

The question in this case is whether the U.S. Army Corps of Engineers exceeded the bounds of its authority under the Clean Water Act or the Commerce Clause when it asserted jurisdiction over isolated, intrastate, water-filled trenches and depressions on SWANCC's land solely because those waters were habitat for migratory birds. Under the Corps' interpretation *of the CWA*, its regulatory authority stretches to virtually every body of water in the country—including seasonally wet areas in homeowners' backyards—because virtually any water body is or could be used as a feeding or resting place by some of the five billion birds that migrate over the continental United States each year. Under the Corps' view *of the commerce power*, its jurisdiction could permissibly extend to any activity that might ultimately decrease interstate travel or commercial spending. This outcome cannot be reconciled with the text and history of the CWA or with our constitutional system of enumerated federal powers.

I. The Corps' assertion of jurisdiction over isolated waters on SWANCC's property is not authorized by the CWA. By using the legal terms "navigable waters" and "waters of the United States" in the CWA, Congress invoked their established meanings as waters that are navigable in fact, that could be made navigable with reasonable improvements, or that are connected to such waters and so could affect their quality. This Court has never suggested that those statutory terms encompass waters with *no* physical connection to navigable waters, like the waters regulated under the migratory bird rule. Legislative history confirms that Congress did not intend the Corps to have authority over waters lacking any connection to navigable waters.

The Corps' migratory bird rule is also flatly at odds with three well-settled principles of statutory construction. First, there is serious constitutional doubt about the propriety of the Corps' assertion of jurisdiction over isolated, intrastate waters used by migratory birds. This Court's precedents require that such doubt be avoided by giving the CWA the narrower interpretation supported by its text and history. Second, severe federal intrusion into areas of traditional state and local control, like the Corps' usurpation of local land use and waste management planning here, can only be justified by a clear statement of congressional intent. Not only is such a statement lacking in the CWA, but Congress made explicit in the Act its intention to preserve state and local land use regulation. Third, the rule of lenity weighs in favor of a narrower interpretation of the CWA, which provides for heavy criminal penalties for violations. These familiar interpretative principles—as well as the principle that Congress may not delegate core lawmaking authority to an agency, and the contradictory administrative history of the migratory bird rule—leave no room for *Chevron* deference to the Corps' aggrandizement of its own authority.

II. The Corps' assertion of jurisdiction violates the Commerce Clause. Migratory bird use of isolated intrastate waters has far too attenuated a connection to interstate commerce for jurisdiction to be upheld as regulation of activities that substantially affect interstate commerce. The migratory bird rule is not directed at inherently economic or commercial activity; it does not contain a jurisdictional requirement that limits its application to activities with a real connection to interstate commerce; there are no congressional findings linking waters used by migratory birds to interstate commerce; and the Corps' rationale would justify federal regulation not just of all waters but of virtually all human activity. There is no intelligible principle behind the Corps' bird rule that would not destroy the distinction, crucial to our constitutional order, between what is truly national and what is truly local.

No alternative constitutional basis for the Corps' assertion of Clean Water Act jurisdiction over SWANCC's property exists. But there are ample constitutional bases in the spending, treaty, and property powers for a myriad of federal statutes protecting waters, wetlands, migratory birds, and a host of other environmental values, which would be wholly unaffected by a decision in SWANCC's favor in this case.

ARGUMENT

I. THE CORPS HAS NO AUTHORITY UNDER THE CLEAN WATER ACT TO REGULATE ISOLATED WATERS MERELY BECAUSE THEY PROVIDE HABITAT FOR MIGRATORY BIRDS

The Clean Water Act gives the Corps jurisdiction over "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344, 1362(7). According to the Corps, this language has virtually no meaning and imposes no limits on the Corps' power. The Corps believes that the CWA extends its regulatory authority—and Section 404's mandatory permit requirements—to any water over which Congress could conceivably exercise jurisdiction under the Commerce Clause. That sweeping claim, which the court of appeals uncritically approved, is the only justification the Corps has ever advanced for its migratory bird rule. That rule draws within the Corps' jurisdiction any water at all, no matter how

small or remote, used by any of the five billion birds that migrate across North America every year.

We explain in Part II that even if the CWA could be read to extend the Corps' jurisdiction to the limits of Congress' commerce power, the migratory bird rule is impermissible because it lacks sufficient connection with interstate commerce. It is unnecessary to reach this constitutional question, however, because the CWA does not give the Corps anything like the all-encompassing authority it claims. In asserting jurisdiction over isolated waters because they are used by migratory birds, the Corps has written the term "navigable waters" out of the Act and wrenched Congress' definition of "navigable waters" as "waters of the United States" from those terms' settled meaning. As the legislative history confirms, no plausible reading of the CWA allows the Corps' practically limitless expansion of its own reach through the bird rule.

If there were any doubt that the CWA does not authorize the migratory bird rule, three well-settled principles of statutory construction resolve it. First, whether or not the Corps' interpretation of its jurisdiction violates the Commerce Clause (and it does), it at least raises serious constitutional questions. When there is another permissible reading of a statute, it must be construed to avoid such constitutional doubts. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-575 (1988). Second, the migratory bird rule infringes on a traditional area of state regulation—land use planning and permitting. An explicit statement of congressional intent is required before a statute will be interpreted to effect such a drastic intrusion on traditional state powers. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991). Here, far from making such a statement, Congress expressed its intention to "protect the primary responsibilities and rights of States" over land use. 33 U.S.C. § 1251(b). Finally, the CWA and Section 404 must be construed narrowly in light of the serious criminal penalties for violations of the statute. *Crandon* v. *United States*, 494 U.S. 152, 168 (1990). Absent evidence of congressional intent to apply Section 404 to isolated intrastate

waters based on their use by migratory birds, the Corps' claim of jurisdiction over SWANCC's balefill site must be rejected.

A. The Plain Language Of The CWA Refutes The Corps' Assertion Of Jurisdiction Over Isolated Waters That Are Migratory Bird Habitat

The CWA's jurisdiction-defining terms "navigable waters" and "waters of the United States" do not authorize federal regulation of isolated waters simply because they are habitat for migratory birds.

1. Congress' regulation of navigable waters has a long history. The Northwest Ordinance provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrance * * * shall be common highways." Northwest Ordinance art. IV (1787); see also *Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874). Consistent with this understanding of navigable waters as "common highways" of commerce, this Court's early cases held that "navigable waters" are waters "which are navigable in fact," meaning "susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). That standard "applie[d] to all water courses." *Utah* v. *United States*, 403 U.S. 9, 11 (1971). Later decisions expanded the concept of "navigable waters" to include waters that had previously been used in navigation or that could be made navigable in the future through reasonable improvements. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

Congress' definition of "navigable waters" as "waters of the United States" (33 U.S.C. § 1362(7)) does not sever, but rather strengthens, the link between the Corps' jurisdiction and the concept of navigability. The phrase "navigable waters of the United States," as distinguished from "waters of the States," has long been used to mean waters over which interstate commerce may pass. *Donnelly* v. *United States*, 228 U.S. 243, 262 (1913) ("what are navigable waters of the United States" depends on whether the water "affords a channel for useful commerce"); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870)

(a river that "is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters * * * is not a navigable water of the United States"); *The Daniel Ball*, 77 U.S. at 563; *Leovy* v. *United States*, 177 U.S. 621, 632 (1900); *Perry* v. *Haines*, 191 U.S. 17, 28 (1903). Though the Act uses the phrase "waters of the United States" rather than "navigable waters of the United States," that phrase is used to *define* the term "navigable waters." In the Act as in this Court's cases, "navigable waters" and "waters of the United States" remain closely intertwined.

The statutory terms "navigable waters" and "waters of the United States" must be understood against this legal backdrop. This Court "assume[s] that when a statute uses" a legal term of art, Congress' choice is not haphazard or insignificant; rather, "Congress intended [the term] to have its established meaning" (*McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991)) and to "adopt the interpretation placed on that concept by the courts." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989); see also *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *The Abbotsford*, 98 U.S. (8 Otto) 440, 444 (1878). The jurisdictional terms Congress used in the CWA carry at their core the meaning established by this Court's decisions: waters that are navigable in fact, have been navigable, or could be made navigable with reasonable improvements.

2. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), casts no doubt on this plain meaning of the CWA's jurisdictional terms. This Court did state in *Riverside Bayview* that "the term 'navigable' as used in the Act is of limited import"—but only in the sense that Congress meant to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. The Court merely recognized that Congress did not use the terms "navigable waters" and "waters of the United States" in the classic *Daniel Ball* sense requiring navigability in fact.

In *Riverside Bayview*, the Court upheld a limited extension of federal regulatory jurisdiction to reach wetlands that,

because of their proximity and function, "are inseparably bound up with the 'waters' of the United States" to which they are "adjacent." 474 U.S. at 134; see *ibid.* ("wetlands may affect the water quality of adjacent lakes, rivers, and streams"). This Court's holding that "a wetland that actually abuts on a navigable waterway" (*id.* at 135) is within the scope of the CWA does *not* mean that an isolated pond with no connection to any navigable waterway is covered. The Court expressly declined to hold that the Corps may exercise jurisdiction over "wetlands that are not adjacent to bodies of open water." *Id.* at 131 n.8, 135.

3. The Corps defends its migratory bird rule as consistent with the CWA by arguing that the statute defines the term "navigable waters" "without qualification" as "the waters of the United States." Thus, "[b]ecause the CWA does not further define the term 'waters of the United States,'" the Corps believes that its interpretation of that term to reach all waters within Congress' commerce power is entitled to deference. Br. in Opp. 13-15 & n.9. That argument is without merit, and not just because, as we show in Part II, the bird rule lies outside the commerce power. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199 (1974) (rejecting argument that "facially narrow" statutory language was intended "to manifest the full degree of [Congress'] commerce power").

It is not permissible for the Corps to read the term "navigable waters" out of CWA Section 404 by looking only to that term's statutory definition as "the waters of the United States." The Corps' interpretation violates the cardinal principle that statutes "must, if possible, be construed in such fashion that every word"—including "navigable" in the CWA—has "operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); see *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000) (rejecting reading under which the statute's "limiting language * * * would have no office").

It is also unreasonable to suppose that a defined term and defining term bear no relationship and that the former loses all meaning, totally subsumed in the latter. See *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 503-504 (1945) (rejecting contention that a statutory definition of the term "produced" to mean "handled, or in any other manner worked on" encompassed "not only handling or working on in relation to producing," but also other "handling or working on"). It would be particularly surprising if the concept of *navigability* disappeared altogether when Congress defined "navigable waters" as "the waters of the United States," given that navigability is a traditional jurisdictional concept with a settled meaning in this Court's jurisprudence. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1301 (2000) ("'Ambiguity is a creature not of definitional possibilities but of statutory context'"). As the Fourth Circuit held in *United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), "as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters."

The Corps' contention that it is free to interpret the term "waters of the United States" to reach all waters within the commerce power also cannot be squared with the principle that Congress is presumed to intend the established legal meaning of terms it uses. *Supra*, p. 16. Congress did not say "waters *in* the United States subject to the commerce power" but "waters *of* the United States," which have always been those waters that "affor[d] a channel for useful commerce" between the States. *Donnelly*, 228 U.S. at 262. Even if that traditional meaning may be stretched, in combination with a broad understanding of "navigable waters," to reach most rivers, streams, and lakes, and waters and wetlands closely related to them, it cannot

conceivably apply to the completely isolated, water-filled mining trenches on SWANCC's land.[8]

4. The Corps erroneously contends that its migratory bird rule is permissible in light of the CWA's purposes to "restore and maintain the * * * biological integrity of the Nation's waters" and provide "for the protection and propagation of * * * wildlife." 33 U.S.C. 1251(a). A statute's general purpose cannot override jurisdictional terms like "navigable waters" and "waters of the United States" that had a settled legal meaning when Congress used them. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("vague notions of a statute's 'basic purpose'" are "inadequate to overcome the words of its text regarding the *specific* issue under consideration"); *Federal Reserve Bd.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986). Nor can the Corps' vast extension of its jurisdiction to cover countless millions of isolated intrastate waters be reconciled with Congress' express policy in the CWA "to recognize, preserve, and protect the primary responsibilities and rights of States" to "plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b); see *infra*, Part I.C.2.

The Corps attaches misplaced significance to this Court's reference in *Riverside Bayview* to the agency's view that "*adjacent wetlands* may 'serve significant natural biological functions'" and are "integral parts of the aquatic environment." 474 U.S. at 134-135 (emphasis added). That was but one (and the least direct) of the connections the Corps said existed between wetlands and adjacent navigable waters. Of greater importance was the fact "that wetlands may serve to filter and purify water draining into adjacent bodies of water" and "slow

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[8] The structure of the CWA also demonstrates the error of the Corps' interpretation. The Act forbids discharge of pollutants into three categories of water: "navigable waters," "waters of the contiguous zone," and "the ocean." 33 U.S.C. §§ 1311, 1362(12). If the term "navigable waters" encompasses all waters subject to federal jurisdiction, there would have been no need separately to prohibit discharges into these other waters. See also 33 U.S.C. § 1343.

the flow of surface runoff into lakes, rivers, and streams," thereby affecting the quality of navigable waters. *Id.* at 134.

Thus, *Riverside Bayview* did *not* endorse the Corps' interpretation of the CWA to reach isolated waters that have *no* connection to navigable waters except that they are habitat for migratory birds (which could at some point alight, feed, or live on virtually any body of water, however insubstantial or evanescent). As Judge Manion has pointed out, the CWA "is not a comprehensive wildlife protection statute. Although the Act mentions wildlife as an important result of controlling pollution, the purpose of the Act is to restore and maintain clean water." *Hoffman Homes, Inc.* v. *EPA*, 961 F.2d 1310, 1322 (7th Cir. 1992), vacated, 975 F.2d 1554, adopted, 999 F.2d 256, 262 (7th Cir. 1993) (Manion, J., concurring). Nothing in *Riverside Bayview* suggests that a potential wildlife connection with navigable waters is enough to bring isolated ponds within the CWA. If such a connection were sufficient, any minuscule body of water capable of attracting a migrating duck or other visiting wildfowl would be subject to federal powers that supersede state environmental regulation. *Riverside Bayview* did not suggest that this limitless basis for federal jurisdiction could be reconciled with the interpretative principles we discuss in Part I.C or with the Constitution.

This Court's opinion in *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90 (1965), is instructive. The Federal Power Act imposes requirements on water projects on "navigable waters of the United States" *and* other waters "over which Congress has jurisdiction under its authority to regulate commerce." 16 U.S.C. § 817. In *Union Electric*, the Court noted that this language does not apply to "projects located on intrastate nonnavigable waters which do not flow into any navigable streams." 381 U.S. at 96-97 & n.9. The CWA's statutory language is *more* limited and so must at least exempt "intrastate nonnavigable waters," like those on SWANCC's property, that are neither connected nor closely related to navigable water.

B. Legislative History Confirms That The CWA Does Not Reach Isolated Waters That Are Migratory Bird Habitat

Legislative history confirms that the CWA does not authorize the migratory bird rule.

1. The original Senate bill defined "navigable waters" as "*the navigable waters* of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." S. 2770, 92d Cong. § 502(h) (1971) (emphasis added). The House bill defined "navigable waters" as the "*navigable waters* of the United States, including the territorial seas." H.R. 11896, 92d Cong. § 502(8) (1972) (emphasis added). Reconciling these differences, the Conference Committee adopted the current language defining "navigable waters" as "waters of the United States, including the territorial seas." The Conference Report does not explain the effect of this change. It merely states that "[t]he conferees fully intend that *the term 'navigable waters'* be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. CONF. REP. NO. 92-1236, at 144 (1972) (emphasis added); see also H.R. REP. NO. 92-911, at 131 (1972) (similar commentary on original House bill).

The Corps places enormous weight on this single sentence. But the conferees did not mean that the CWA gives the Corps the maximum constitutional authority over *waters*. If Congress had intended to regulate all *waters* within its commerce power it knew how to say so. See 33 U.S.C. § 817(1) (reaching nonnavigable waters "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States"); see also *Jones*, 120 S. Ct. at 1909 (the unqualified "statutory term 'affecting * * * commerce' * * * signal[s] Congress' intent to invoke its full authority under the Commerce Clause").

Rather, the Conference Report reflects Congress' intent to enact a broad definition *of the term "navigable waters."*

Nothing suggests that Congress intended the CWA's jurisdictional language to be interpreted so that "waters of the United States" no longer acts, in any meaningful sense, as a definition of "*navigable* waters." To the contrary, the legislative history demonstrates that Congress understood that the Corps' jurisdiction would be limited to waters bearing a significant relationship to navigable waters and the carriage of interstate commerce. Thus, Senator Muskie, Senate floor manager for the conference bill, gave this explanation in terms very like those used by this Court in its prior cases:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1, at 178 (1973) ("Leg. Hist."); see *id.* at 163-164.

In the House, Representative Dingell explained that the new definition was broader than "'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 1 Leg. Hist. at 250. The statute is "in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the *Daniel Ball* [navigable-in-fact test]—to include waterways which would be 'susceptible of being used * * * with reasonable improvement,' as well as those waterways which include sections presently

obstructed by falls, rapids, sand bars, currents, floating debris." *Ibid.* Under the new definition, "it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways." *Ibid.*, citing *Utah*, 403 U.S. at 11 ("The lake was used as a highway and that is the gist of the federal test").

As Senator Muskie and Representative Dingell spelled out, while "[n]avigable waters" means more than waters navigable in fact, it still requires that waters be part of or closely related to "waters of the United States" as this Court has always understood that term to mean a link in the "highways" of interstate commerce. The congressional understanding of the statute is inconsistent with the Corps' migratory bird rule.

Just as telling is what the legislative history does *not* say. If the CWA had the sweep that the Corps contends, it would require citizens (including ordinary homeowners whose backyards are visited by ducks after heavy rains) to seek Section 404 permits before altering almost any small, isolated pond or wetland.[9] Yet there is not one word of this in the legislative history. One is "struck by what Congress did not say. * * * Congress would certainly recognize" the consequences of extending Section 404 to so many areas of American life—not the least of which is a dramatic "alter[ation of] sensitive federal-state relationships"; "the fact that they are not even discussed in the legislative history * * * strongly suggests that Congress did not intend" "navigable waters" to be read so broadly. *Rewis* v. *United States*, 401 U.S. 808, 811 (1971).

2. The Corps relies on legislative history of 1977 amendments to the CWA, in particular, Congress' failure to enact a

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[9] The Corps claims jurisdiction over filling "waters of the United States" for "construction or expansion of a single-family home" used as "a personal residence," or for "attendant features" like a "garage, driveway, storage shed," or "yard"). 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999); 61 Fed. Reg. 65,874, 65,898 (Dec. 13, 1996).

proposal to limit the Corps' jurisdiction to wates navigable in fact or capable of being made navigable. Even if this history helped the Corps—which it does not—it is of little relevance. "[T]he intent of Congress must be culled from the events surrounding passage" of disputed provisions in 1972; "[o]pinions attributed to a Congress [five] years after the event cannot be considered evidence of the intent of the Congess in [1972]." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963); see also *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265 (1945) (Congress' "failure in 1939 and 194) to adopt an amendment * * * cannot operate retroactively ** * to give the statute enacted in 1938 a different meaning"); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S 102, 118 n.13 (1980). Because "textual and contemporaneous evidence" is "clear," "the subsequent legislative record" cannot alter the natural reading of the CWA, which forbids the bird rule. *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994).

Upholding the Corps' interpretation of "navigable waters" to reach wetlands *adjacent* to navigable wates in *Riverside Bayview*, this Court did deem it relevant that "the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress [in 1977] rejected measures designed to curb the Corps' jurisdiction." 474 U.S. at 137. No analogous argument supports the bird rule, which *was not announced until 1986 and was based on a 1985 EPA memorandum*. See *infra*, Part I.D.3.

The Corps issued regulations in the middle of Congress' consideration of the CWA amendments that purported to cover isolated waters that are "part of a chain or connection to the production, movement, and/or use of interstate commerce." 42 Fed. Reg. 37,122, 37,127 (July 19, 1977); *id.* at 37,144. The notion that migratory bird use could draw a pond into that category would have astounded Congress. No one in 1977 so much as mentioned migratory birds as a basis for Corps jurisdiction. Nor did Congress defeat any proposal "designed to supplant" that basis for jurisdiction. *Riverside Bayview*, 474 U.S. at 137.

In fact, it cannot be inferred that Congress in 1977 acquiesced in *any* Corps jurisdiction over isolated, non-adjacent waters. There was agreement among legislators that the Corps exceeded its jurisdiction when it issued a press release in 1975 (later repudiated) claiming that Section 404 permits might be required to enlarge stock ponds, deepen irrigation ditches, and fight stream erosion.[10] The debate in Congress was not about whether, but how, to curb this overreaching. Many in Congress supported a House bill confirming that "navigable waters" are navigable in fact or that could be made so by improvement. H.R. 3199, 95th Cong. § 16 (1977).[11] Others, however, were concerned that the House bill went too far. In light of Congress' desire to ensure that the Corps retained authority over "small streams, marshes, wetlands, and swamps *which will make their way into the bigger waterways of the this country,*" even though these waters were not and could not reasonably be made navigable in fact, Congress adopted a compromise that exempted activities such as "normal farming [and] ranching activities" from Section 404 and authorized the Corps to issue general permits for categories of activities. 4 Leg. Hist. 1977 at

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[10] *E.g.*, 4 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. 95-14, at 1248-1249 (1978) ("Leg. Hist. 1977") (Reps. Edgar and Myers) (press release "made very dubious analyses of the section 404 program"); *id.* at 1350 (Rep. Cleveland) (complaining of "all the idiocies that came out the early Corps of Engineers announcements"); *id.* at 948 (Sen. Muskie) ("The Corps proceeded to take [Section 404] and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over").

[11] *E.g.* 4 Leg. Hist. 1977 at 905 (Sen. Bentsen), 924 (Sen. Domenici), 933 (Sen. Dole), 940 (Sen. Hansen), 1290 (Rep. Hagedorn), 1323-24 (Rep. Alexander), 1344 (Rep. Hammerschmidt), 1345 (Rep. Breaux), 1346 (Rep. Smith), 1396-1397 (Rep. McKay).

908 (Sen. Hart) (emphasis added); see Pub. L. No. 95-217 § 67, 91 Stat. 1566, 1600-1606 (1977).

Nothing in this history suggests that Congress acquiesced in the Corps' regulation of isolated water bodies that could in no way affect the quality of navigable waters. No bill stating that such waters were outside the Corps' authority came before Congress and none was defeated. That Congress did not adopt the much more aggressive House bill tells us nothing about Congress' views regarding federal authority over wholly isolated waters. "It is impossible to assert with any degree of assurance that congressional failure" to adopt the House bill "represents congressional approval of" the Corps' 1977 interpretation of the CWA to reach isolated waters (42 Fed. Reg. at 37,127), much less the bird rule that was not published until nine years later. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 186 (1994).

C. Settled Rules Of Statutory Construction Resolve Any Doubts Against The Migratory Bird Rule

Even if the text and legislative history of the CWA did not so clearly forbid the Corps' extravagant assertion of jurisdiction over SWANCC's isolated, water-filled mining trenches based on their use by migratory birds, well established canons of statutory interpretation resolve any doubt against that expansion of federal power.

1. "'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter.'" *Jones*, 120 S. Ct. at 1911. This is a "cardinal principle," "beyond debate." *DeBartolo*, 485 U.S. at 575. Because it reflects the "prudential concern that constitutional issues not be needlessly confronted" (*ibid.*), it applies not only where an interpretation clearly would be unconstitutional, but also where an interpretation would raise serious questions about a statute's validity. *Jones*, 120 S. Ct. at 1911-1912; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *United States* v. *Jin Fuey Moy*, 241 U.S.

394, 401 (1916); see also *Jones* v. *United States*, 526 U.S. 227, 251 n.11 (1999) (in rejecting a constitutionally doubtful interpretation this Court does "not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns").

The principle that constitutional doubts must be avoided applies with full force when the challenged interpretation is embodied in an administrative regulation. See *DeBartolo*, 485 U.S. at 575; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979). Only the "'clearest indication'" of Congressional intent overcomes the presumption against an administrative interpretation of questionable constitutionality. *DeBartolo*, 485 U.S. at 577; see also *United States* v. *Five Gambling Devices*, 346 U.S. 441, 450 (1953) (plurality) (requiring "unmistakable intention of Congress to raise the constitutional questions" implicated by a broad construction).

We show in Part II that predicating jurisdiction over isolated waters on their use by migratory birds violates the Commerce Clause. But whether or not the migratory bird rule is actually unconstitutional, it at least "raises serious and important constitutional questions." *Cargill, Inc.* v. *United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting from denial of certiorari). Even *defenders* of the rule concede that it "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir. 1995). Given the absence of clear evidence that Congress intended the Corps to regulate isolated waters simply because migratory birds use them, the "serious [constitutional] doubts about the propriety of the Corps' assertion of jurisdiction" require rejection of this interpretation. *Cargill*, 516 U.S. at 958 (Thomas, J.); see *Leovy*, 177 U.S. at 633 (if the term "navigable water of United States" swept so broadly that "scarcely a creek or stream in the entire country" would be excluded, then the statute's "validity might well be questioned"); *Wilson*, 133 F.3d at 257 ("Absent a clear indication to the contrary, we should not lightly presume" that

"Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner").

2. A second, equally fundamental, rule of statutory construction is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (a statute will not be read to "displace traditional state regulation" unless "the federal statutory purpose [is] 'clear and manifest'"); *Gregory*, 501 U.S. at 460-461; *Palmer* v. *Massachusetts*, 308 U.S. 79, 84 (1939); *Rewis*, 401 U.S. at 811-812. That principle precludes reading the CWA to displace state and local authority over isolated waters merely because migratory birds alight on them.

a. The CWA reflects traditional views of the division of regulatory authority over waters. "Navigable" "waters of the United States," which are part of or connected to water highways of interstate commerce, are regulated by the federal government. At the same time, Congress "recognize[d]" and sought to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). The Corps' bird rule, by extending "waters of the United States" to wholly isolated, intrastate waters just because they are used by migratory birds, readjusts this balance between state and federal authority without *any* warrant in the text or history of the CWA—let alone the "clear and manifest" statement that this Court requires—and in plain contradiction of 33 U.S.C. 1251(b).

Given its "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States" (*United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring)), this Court should not

countenance the Corps' assault on local jurisdiction over tens of millions of acres. This Court has long recognized "the authority of state and local governments to engage in land use planning." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)). Indeed, regulation of land use and zoning "is perhaps the quintessential state activity" (*FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982)), and has been "traditionally performed by local governments." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); see also *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979) ("The regulation of land use is traditionally a function performed by local governments"); *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975) ("zoning laws and their provisions * * * are peculiarly within the province of state and local legislative authorities"). Under the migratory bird rule, the Corps acts as a sort of super zoning board or land use authority over vast amounts of land containing isolated ponds used by migratory birds—able to bar projects that have been approved by state and local authorities (like SWANCC's balefill) based on the Corps' view that they do not comport with the "public interest." 33 C.F.R. § 320.4(a). "An inroad upon [matters heretofore traditionally left to local custom or local law] of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." *FTC* v. *Bunte Bros.*, 312 U.S. 349, 354 (1941).

b. Not only do States and their subdivisions have general authority over land use, but they have also paid considerable attention to water resources and wetlands conservation. Disproving predictions of a "race to the bottom," state governments have acted as leaders in environmental regulation and would doubtless be more active still had the federal government not asserted authority in this area. See Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 47-48 (1999); National Governors' Association, *Policy NR-3, Water Resource Management*, <http://www.nga.org.pubs/policies/nr/nr03.asp> (visited July 18, 2000).

Illinois has had a long-standing commitment to protecting water resources. Since 1970, the Illinois Constitution has required the state "to provide and maintain a healthful environment." ILL. CONST. art. XI, § 1. Illinois "was one of the first states to enact a comprehensive system of environmental statutes and regulations" (Bullwinkel, *Environmental Law—The Uneasy Accommodation Between State and Federal Agencies*, 25 DEPAUL L. REV. 423, 423 (1976)), and has been recognized as being "in the forefront of water pollution control." Ginsberg & Harsch, *The National Pollutant Discharge Elimination System in Illinois: The State Assumes Direct Authority*, 27 DEPAUL L. REV. 739, 745 (1978). By the time Congress passed the CWA, Illinois "already had sophisticated water pollution control programs" (*id.* at 746) and had established state institutions tasked with pollution control. Bullwinkel, 25 DEPAUL L. REV. at 423. Illinois has since enacted laws charging state agencies with protection of wetlands and groundwater, and with overseeing solid waste management projects like SWANCC's. *E.g.*, Interagency Wetland Policy Act, 20 ILCS 830/1; Illinois Groundwater Protection Act, 415 ILCS 55/1; Illinois Solid Waste Management Act, 415 ILCS 20/1.

"State officials," moreover, "have better knowledge of local environmental concerns than federal officials ever could." Adler, 29 ENVTL. L. at 52. Because Illinois, like other states, has in place a comprehensive scheme for protecting local water resources, the Corps' oversight over the isolated waters on SWANCC's property is unnecessary from a conservation standpoint and objectionably intrusive into a well-functioning state regulatory scheme. Worse, solid waste disposal planning requires that state and local agencies overcome substantial "NIMBY" obstacles. See *supra*, p. 3 n.2; Adler, 29 ENVTL. L. at 67 n.346. In this politically sensitive area—where it is very difficult to secure approval for any project—imposing an additional federal level of regulation is especially burdensome and harmful. SWANCC's state-approved balefill plan is the product of a long and costly search for a solution to a local problem. If Congress intends to authorize the Corps to use

Section 404 to effect virtual federal occupation of this field, which is the practical effect of the bird rule, it must say so.

3. The CWA is a criminal as well as civil statute. A violation carries fines up to $100,000 per day and six years imprisonment. 33 U.S.C. § 1319(c)(2). Even a *negligent* violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Corps' interpretation, anyone—including a homeowner—who discharges fill material into an isolated, intrastate pond, negligently failing to realize that it is (or could be) a migratory bird habitat, commits a criminal offense.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. These rules apply in civil cases to statutory provisions, like Section 404, that have both criminal and civil consequences. As this Court explained in a civil case concerning "a tax statute [with] criminal applications," the rule of lenity "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality); *id.* at 519 (Scalia and Thomas, JJ., concurring); see also *Crandon*, 494 U.S. at 158.[12]

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[12] *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 n.18 (1995), where this Court declined to apply the rule of lenity to a "facial challeng[e] to administrative regulations" on the ground that principles of fair warning were not implicated when a clear regulation had "existed for two decades," is easily distinguished. This case involves an as-applied, not a facial challenge. The basis on which the Corps asserted jurisdiction over SWANCC's property was a brief statement that appeared in the Federal Register as a preamble to a regulation, never in the Code of Federal Regulations. And the bird rule was applied to SWANCC only one year after it was first formulated by the Corps.

"[T]ext, structure, and history" do not establish that the migratory bird rule is an "unambiguously correct" interpretation of the CWA. *Granderson* v. *United States*, 511 U.S. 39, 54 (1994). The rules of lenity and strict construction therefore require that this basis for federal jurisdiction be rejected. See *Jones*, 120 S. Ct. at 1912.

D. The Corps' Expansion Of Its Power To Reach Migratory Bird Habitat Is Not Entitled To Deference

The Corps' interpretation of Section 404 to cover isolated water-filled depressions used by migratory birds is not entitled to the judicial deference accorded reasonable agency interpretations of ambiguous statutory language. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1. The CWA's jurisdictional terms "navigable waters" and "waters of the United States" are *not* ambiguous when read in light of settled meanings established in this Court's decisions and do not authorize the migratory bird rule. *Supra*, Part I.A. The CWA's legislative history confirms that Congress adopted those judicial definitions. *Supra*, Part I.B. And three established principles of statutory interpretation condemn the Corps' reliance on migratory birds to establish jurisdiction over isolated waters. *Supra*, Part I.C. A court will "defer to [an agency's] interpretation of a statute only after 'employing traditional tools of statutory construction.'" *Sullivan* v. *Everhart*, 494 U.S. 83, 103 (1990); see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998). Applicable rules of construction eliminate any ambiguity in this case and leave nothing to be resolved through application of *Chevron* principles.[13]

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[13] Courts routinely hold that *Chevron* deference is inappropriate when an agency's statutory interpretation raises serious constitutional doubt. *E.g.*, *U.S. West, Inc.* v. *FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999); *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995); see *GTE Service Corp.* v. *FCC*, No. 99-1244 (cert. granted June 5, 2000) (presenting question whether deference is owed to an agency interpretation that raises questions under the Takings Clause).

2. The Corps' claim to deference raises serious problems of delegation of lawmaking authority. Whether or not Congress constitutionally could have enacted the migratory bird rule, it did not do so. Congress chose instead to regulate pollution of "navigable" "waters of the United States" based on the view that polluting those waters had a sufficient effect on interstate commerce to support federal jurisdiction. In so doing, Congress defined the type of connection to interstate commerce that would justify application of the CWA.

The Corps ignores that congressional determination in its bird rule, which relies on a *different* alleged connection to interstate commerce as its constitutional basis. In essence, the Corps claims authority to determine whether it is "necessary and proper" to regulate intrastate ponds used by migratory birds in order to protect interstate commerce. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 231-232 & n.11 (1948); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-585 (1985) (O'Connor, J., dissenting); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-814 & n.23 (3d ed. 2000). But Congress focused on human navigation, not the episodic migration of waterfowl.

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress.'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976); see *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 583, 613-614 (1983) (O'Connor, J., concurring). There is *no* evidence that Congress delegated to the Corps its full constitutional authority, under the Commerce and Necessary and Proper Clauses, to determine

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There is also substantial doubt whether deference is due to an agency's interpretation of the scope of its own jurisdiction. See *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) (agency may not invoke discretion to "bootstrap itself into an area in which it has no jurisdiction").

whether a class of intrastate waters is sufficiently related to interstate commerce to fall within federal control. See *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch"). This Court should not presume that Congress intended such a sweeping and constitutionally questionable delegation. See *United States* v. *George*, 228 U.S. 14, 21 (1913) (refusing to interpret statute to "confer unbounded legislative powers").

3. Finally, the strange and contradictory history of the migratory bird rule should give pause before deferring to this limitless extension of the Corps' jurisdiction. Following passage of the CWA in 1972, the Corps' took the position that the Act preserved its jurisdiction under the River and Harbor Act of 1899 over waters that are tidal or that are "presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 39 Fed. Reg. 12,050, 12,119 (Apr. 3, 1974). In 1975 a district court issued a one-page opinion holding that the CWA "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause" and was "not limited [by] traditional tests of navigability." *NRDC* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

Rather than appeal, the Corps issued interim regulations expanding Section 404 permit requirements to "[i]ntrastate lakes [larger than 5 acres], rivers and streams" if they were used in specified ways relating to interstate commerce. 40 Fed. Reg. 31,319, 31,324-25 (July 25,1975). The Corps never suggested that this provision, or a catch-all provision applying to "other waters which the District Engineer determines necessitate regulation" (*ibid.*), made it necessary to secure a permit to fill isolated waters that serve as migratory bird habitat.

The Corps issued new regulations in 1977 that redefined "waters of the United States" to include "[a]ll other waters of the United States * * *, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of

which could affect interstate commerce." 42 Fed. Reg. at 37,144. The Corps asserted in a footnote that this rule encompassed all "waters of United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious." *Id.* at 37,144 n.2. Nowhere did the 1977 regulations even hint that migratory birds were a basis for jurisdiction.

Years later, in 1985, Corps personnel testified to a Senate Committee that the Corps "does accept the notion that migratory waterfowl does constitute a nexus with interstate commerce." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 99th Cong. 168 (1985); *id.* at 190. In response to a Senator's inquiry, EPA prepared a memorandum claiming jurisdiction over all waters that "'are used or would be used' by migratory birds." Memorandum from F. Blake to R. Sanderson (Sept. 12, 1985). Relying on this, the Corps included its bird rule in the *preamble* to a 1986 revision of its regulations—14 years after passage of the CWA. 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986).[14]

The Corps' lengthy delay in "realizing" that Section 404's mandatory requirements apply to isolated ponds used by migratory birds—as well as its about-face from its contemporaneous

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[14] The Corps did not promulgate the bird rule in accordance with Section 553 of the Administrative Procedure Act, so it has never been subject to notice and comment. In *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (mem.), the rule was invalidated for that reason. Nevertheless, the Corps and EPA take the position that "notwithstanding * * * *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds." GUIDANCE FOR CORPS AND EPA FIELD OFFICES REGARDING CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF UNITED STATES V. JAMES J. WILSON, at 6 n.3 (May 29, 1998).

interpretation—undercut its claim to deference. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130 (1983); *Aluminum Co.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984). In addition, agency interpretations promulgated without notice and comment or other formal procedures, like the bird rule, "do not warrant *Chevron*-style deference," but are only entitled to any respect commanded by their "'power to persuade.'" *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662-1663 (2000); see *Reno* v. *Koray*, 515 U.S. 50, 61 (1995); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256-258 (1991). Given the Corps' failure to come to grips with statutory language, interpretative principles requiring a narrow construction, or constitutional limitations, no such respect is due here.

II. THE CORPS MAY NOT CONSTITUTIONALLY REGULATE ISOLATED WATERS MERELY BECAUSE THEY PROVIDE HABITAT FOR MIGRATORY BIRDS

If this Court concludes that the CWA permits the Corps to regulate any waters used as habitat by migratory birds, then it must consider whether the Corps' migratory bird rule is constitutional. It is not.

A. Regulation Of Isolated Waters Used By Migratory Birds May Not Be Upheld As Regulation Of "Activities That Substantially Affect Interstate Commerce"

Congress' power under the Commerce Clause extends to "'three broad categories of activity'" (*United States* v. *Morrison*, 120 S. Ct. 1740, 1749 (2000)): (1) "the use of the channels of interstate commerce," which permits Congress to exclude harmful uses and products from those channels; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," which "Congress is empowered to regulate and protect"; and (3) "those activities having a substantial relation to interstate commerce, * * * *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-559.

As the court below recognized, and the Corps apparently concedes (Br. in Opp. 17), the migratory bird rule "could only have been sustained as an exercise of the third variety of regulatory power," over activities that substantially affect interstate commerce. Pet. App. 6a. But the Corps has not shown *any* discernible effect on interstate commerce, much less a substantial one, caused by filling isolated ponds on SWANCC's property. See Pet. App. 6a, 20a. The sole basis for federal authority that the Corps relies on—which was also the sole basis relied on by the court below (Pet. App. 7a)—is the cumulative effect of "[t]he filling of wetlands and similar aquatic areas that serve as migratory bird habitat [on] the ability of people to pursue recreational and commercial activities associated with migratory birds." Br. in Opp. 19. Applying the four factors considered by this Court in finding the Gun-Free School Zones Act ("GFSZA") and Violence Against Women Act ("VAWA") to be outside the commerce power, it is clear that the Corps has failed to show a sufficient relation between interstate commerce and migratory bird use of isolated waters to support federal regulation.

1. As this Court emphasized in *Lopez* and *Morrison*, Congress' power under the Commerce Clause is centered on just that—commerce. "[T]hus far in our Nation's history," the Court stressed, "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751.

Like GFSZA and VAWA, the migratory bird rule prohibits activities that are not inherently economic or commercial: adding any "pollutant" (including fill material) into any "navigable water" that is an actual or potential habitat for migratory birds, without a permit. It applies equally to a private homeowner who landscapes the backyard, fills a damp patch to prevent mosquitos, or builds a storage shed (see *supra*, p. 23 n.9), and to a commercial developer who bulldozes a marsh. The Corps has even taken the position that the migratory bird rule regulates "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland," all of which might "'degrade' the

wetland within the meaning of this rule." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993).[15] Permit applications have involved wetlands as small as 26 square feet, or about half the size of a ping-pong table. V. ALBRECHT & B. GOODE, WETLAND REGULATION IN THE REAL WORLD 21 (1994). Obviously, many of the activities covered by the rule are not "commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 414, 417-418 (1998) (the bird rule is "indefensible" as regulation of commerce "under any untortured definition of the word"). The aggregation theory may not, therefore, be used to find a substantial effect on interstate commerce warranting federal power. *Morrison*, 120 S. Ct. at 1749-1750; *Lopez*, 514 U.S. at 559-561.

The Corps contends that the migratory bird rule is nonetheless permissible because prevention of harm to migratory birds "has long been recognized to be a matter of national concern." Br. in Opp. 18. But characterizing something as of "national concern" does not make it a proper subject for federal regulation despite its noncommercial character. Few would doubt that spousal abuse and the impact of gun-related violence on education are of "national concern," as are the high divorce rate, urban crime, and early childhood education. Nonetheless, the commerce power does not encompass VAWA or GFSZA, any more than it permits plenary regulation of divorce, crime, or public elementary schools. *Morrison*, 120 S. Ct. at 1752-

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[15] Applying a "de minimis exception," the Corps has sometimes exercised its discretion not to regulate this type of activity so long as its adverse effects are minimal. 58 Fed. Reg. at 45,020. The Corps and EPA have emphasized, however, that "the threshold of adverse effects for the de minimis exception is a very low one" and that activities need not cause significant impairment or degradation of a wetland in order to fall under the migratory bird rule. *Ibid.*

1753; *Lopez*, 514 U.S. at 564. The last time we checked, there was no "national concern" clause in the Constitution.

None of the cases the government has relied on supports its argument that the Commerce Clause permits regulation of noncommercial conduct that might, in the aggregate, indirectly affect commerce related to migratory birds. Two of those cases involve Congress' authority to protect migratory birds under *different* provisions of the Constitution—the Treaty Clause and the Spending Clause. *North Dakota* v. *United States*, 460 U.S. 300, 309-310 (1983) (spending power); *Missouri* v. *Holland*, 252 U.S. 416, 431-432 (1920) (treaty power). The third involved a ban on *commercial* transactions in wildlife. *Andrus* v. *Allard*, 444 U.S. 51, 54 (1979). We do not dispute that the Commerce Clause permits Congress to regulate commercial transactions in animals. See *Lopez*, 514 U.S. at 573-574 (Kennedy, J., concurring); *Douglas* v. *Seacoast Prods.*, 431 U.S. 265, 281-282 (1977). That principle does nothing, however, to further the Corp's claim of authority over waters just because they are used by migratory birds. See *Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari).

2. The second factor emphasized by this Court in holding GFSZA and VAWA outside the scope of the commerce power was the absence of an "express jurisdictional element" limiting the statute's reach to conduct having "an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562; *Morrison*, 120 S. Ct. at 1750-1751. The migratory bird rule likewise lacks any jurisdictional element that narrows its application to constitutional limits.

3. The third factor relied on in *Lopez* was the lack of any congressional findings regarding the effects on interstate commerce of the regulated conduct. 514 U.S. at 562; see also *Morrison*, 120 S. Ct. at 1751. It is readily apparent from the CWA's legislative history that Congress never even considered the possibility of regulating small ponds that are habitat for migratory birds. Unsurprisingly, therefore, Congress made no findings that discharge of pollutants into the habitat of migratory birds has a substantial effect on interstate commerce.

The principle that the government may regulate activity with only a *de minimis* connection to interstate commerce rests on the assumption that Congress has declared that the "entire class of activities affects commerce." *Maryland* v. *Wirtz*, 392 U.S. 183, 192 (1968); see *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *United States* v. *Darby*, 312 U.S. 100, 120-121 (1941). Deference is appropriate because it is Congress' role, under the Constitution, to select the means necessary and appropriate to protect interstate commerce. *Five Gambling Devices*, 346 U.S. at 449 (plurality); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 419-420, 423-424 (1819); see Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107, 118 (1998). Where there are *no* congressional findings, the Court must scrutinize carefully the constitutional sufficiency of the nexus to interstate commerce (*Copp Paving*, 419 U.S. at 197 n.12; *Wirtz*, 392 U.S. at 192; *Darby*, 312 U.S. at 120-121), in order to "safeguar[d]" local interests against undue agency intrusion. *Yonkers* v. *United States*, 320 U.S. 685, 690-692 (1944). Absent a congressional finding to the contrary, the occasional landing of birds on an isolated pond is plainly insufficient to invoke federal jurisdiction over "interstate commerce."

4. Finally, this Court held in *Lopez* and *Morrison* that the asserted connection to interstate commerce must not be so attenuated as to threaten the constitutional principle of enumerated powers. In *Lopez*, for example, the Court emphasized that the government's reasoning would permit Congress to "regulate not only all violent crime, but also all activities that might lead to violent crime," as well as any activity "related to the economic productivity of individual citizens." 514 U.S. at 564. In *Morrison*, the Court noted that the rationale supporting VAWA would justify federal regulation of "any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," along with other areas of traditional state regulation whose "aggregate effect * * * on the national economy is undoubtedly

significant." 120 S. Ct. at 1752-1753. These results, the Court held, were irreconcilable with Our Federalism. *Lopez*, 514 U.S. at 564-568; *Morrison*, 120 S. Ct. at 1754.

The rationale relied on below involves a causal chain even longer and more speculative than those rejected in *Lopez* and *Morrison*. The Seventh Circuit reasoned that individual instances of filling isolated ponds might lead to an aggregate loss of waters, which could in turn reduce the population of migratory birds, which could in turn impede the hunting, trapping, and observation of migratory birds. Pet. App. 7a. Because people spend money and cross state lines to hunt, trap, and observe migratory birds, the potential adverse impact on interstate commerce resulting from filling isolated wetlands was said to be substantial. *Ibid.* The Corps relies on a similar theory. Br. in Opp. 19 ("The filling of wetlands and similar aquatic areas that serve as migratory bird habitat directly affects the ability of people to pursue recreational and commercial activities associated with migratory birds").

"If this elaborate chain of contingencies does not stretch the limits of reason, it is hard to imagine a chain that would." Linehan, 2 TEX. REV. L. & POLICY at 419. The consequences of accepting this link to interstate commerce as constitutionally sufficient demonstrate that the migratory bird rule is a "limiter-manque—a limiting rule with no limits." Holman, Note, *After* United States *v.* Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 197 (1995). It is a clear example of what this Court cautioned against in *Maryland* v. *Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." 392 U.S. at 196 n.27; see *Copp Paving*, 419 U.S. at 198 (a "chain of connection" that "ha[d] no logical endpoint" resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC* v. *Mississippi*, 456 U.S. at 758 n.23 (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

As a practical matter, permitting the Corps to regulate any place migratory birds use—or might use—for "their life requirements" (AR 15578) would mean plenary federal authority over land use. Some five billion land birds migrate across North America each year, and migratory flyways cover the entire continental United States. THE ATLAS OF BIRD MIGRATION 54-83 (ed. J. Elphick 1995); R. PETERSON, A FIELD GUIDE TO BIRDS 305-370 (4th ed. 1980). "[A]s birdwatchers will attest, migratory birds will alight almost anywhere." Holman, 15 VA. ENVTL. L.J. at 197. The development of *any* part of a migratory bird flyway could adversely affect birds dependent upon it, and the cumulative effect of development could be substantial. Under this theory, therefore, the Corps would have general land use power.[16]

Land-use planning and landfill siting, we have already explained, are long-standing functions of state and local government. *Supra*, Part I.C.2. SWANCC's proposed balefill was subject to local and state approval, which was granted only after exhaustive consideration of thousands of pages of submissions and multiple public hearings. *Supra*, pp. 5-7. Despite these approvals, SWANCC's project was stopped dead by the

[16] The court of appeals reasoned that the Corps' constitutional argument does not give it authority over "every puddle" because the bird rule permits regulation only of migratory bird "habitat," which the court defined as sites at which migratory birds "'naturally liv[e] or gro[w].'" Pet. App. 7a-8a. Given that billions of migratory birds move freely and continuously from one place to another, it is difficult to imagine how they would "live and grow" except by stopping for food, water, and rest. They do so regularly, as most homeowners know, in backyards that collect water in the spring and fall. Thus, the court's supposed limitation was no limitation at all. Besides, the "habitat" requirement is not part of the Corps' rationale, under which federal regulation is permitted because it protects migratory birds from harm. Migratory birds are presumably affected by the loss of ponds used for resting or feeding, just as they are affected by elimination of waters used as seasonal homes; the same logic would permit federal regulation of both.

Corps' permit denial. The Corps' regulation in this area of traditional state sovereignty, overruling considered judgments of state and local governments, threatens the basic "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; see *Lopez*, 514 U.S. at 564, 568.

By adopting a sweeping uniform approach, the migratory bird rule thwarts local regulatory schemes and keeps states from performing their role as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "[S]tunting local policy experimentation" by imposing top-down federal regulation of isolated ponds "can leave in place a dysfunctional national policy, with states unwilling—or unable, thanks to preemption—to solve the problem."[17] Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 308 (2000). This intrusion in an area of traditional local control weighs heavily against a finding that migratory bird-based jurisdiction over isolated waters is necessary and proper to protect interstate commerce. See *Printz* v. *United States*, 521 U.S. 898, 923-924 (1997); Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 100-101 (1985).

If the Corps' argument for regulatory authority is constitutionally sufficient, it is difficult to envision an arena of human life immune from federal control. The Corps relies on the nexus between migratory birds and bird-related hobbies that impact interstate commerce to justify regulation of the birds' environments. The hobbies themselves, however, are engaged in by people. It seems safe to assume that, whatever effect migratory

[17] There is good reason to believe that regulation of isolated waters under the migratory bird rule is a "dysfunctional policy." See Adler, 29 ENVTL. L. at 63-66 (discussing trends in wetlands losses and incentives to destroy wetlands created by the current federal regulatory system, and finding "little evidence" that Section 404 regulation has prevented wetlands loss).

birds might have on interstate commerce, the effect of hunters, trappers, and birdwatchers is even greater. Why would the Corps not be permitted, therefore, to regulate every aspect of the environment of people who hunt, trap, and watch migratory birds? And of course, bird-related hobbies are just a subset of the many leisure activities that impact interstate commerce.[18] The Corps' rationale would permit not only regulation of all those who engaged in those hobbies, but regulation of all of the hobbies' "component parts." The consequences of accepting federal regulation based on a highly attenuated and remote nexus to interstate commerce are clear, and clearly impermissible: federal authority would completely eclipse the authority of the States over local affairs.

Although the commerce power gives Congress broad power, it "is not without effective bounds" (*Morrison*, 120 S. Ct. at 1748), and enforcement of those bounds is "'essential to the maintenance of our constitutional system.'" *Lopez*, 514 U.S. at 555. The Corps has not identified a single factor—regulation of commercial activities, an express nexus to interstate commerce, congressional findings that the regulated activities substantially affect interstate commerce, or a constitutional rationale that justifies the Corps' action yet would not lead to unlimited federal power—to justify the migratory bird rule. Under *Lopez* and *Morrison*, the Corps' asserted jurisdiction in this case is outside the scope of the Commerce Clause.

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[18] For example, hobbyists annually spend $4.3 billion on needlework and sewing supplies (Hobby Industry Ass'n, *1996-1997 Size of Craft/Hobby Industry Study, Executive Summary*, <www.hobby.org/size.html> (vistited July 19, 2000)); $7.3 billion on woodworking supplies (Bulkeley, *As a Work of Art, Windsor Chair Gets a Standing Ovation*, WALL ST. J., Aug. 15, 1997, at A1); and $22 billion on their gardens (Brown, *It's Already Spring*, BOSTON GLOBE, Mar. 1, 1998, at 1). They travel interstate to attend shows and events, bid at auctions, study, view exhibits, visit gardens, and for a myriad of other reasons tied to their hobbies, spending billions of dollars in the process.

B. The Commercial Nature Of SWANCC's Landfill Is Not A Proper Basis For The Corps' Jurisdiction

The Corps implies that applying the migratory bird rule in this case is constitutional because SWANCC's balefill "is clearly an economic activity." Br. in Opp. 11 n.6. Of course, nothing in the migratory bird rule even hints that jurisdiction over isolated waters depends on their being threatened by an interstate commercial activity. To the contrary, the bird rule is a blanket rule purporting to declare that "degradation or destruction" of isolated waters that are or could be migratory bird habitat—which the Corps says may occur by the quintessentially noncommercial acts of walking or bicycling through—*automatically* "affect[s] interstate commerce." Pet. App. 39a, 40a; 58 Fed. Reg. at 45,020.[19]

The Corps has not explained why it is appropriate to focus on the commercial nature of the local fill activity, when that nexus to interstate commerce *is wholly unrelated to the migratory bird rule under which the Corps purports to regulate or to the constitutional nexus identified by Congress as the basis for the Clean Water Act*. This Court has never previously upheld the application of a statute or regulation based on a nexus between the regulated conduct *in that case* and interstate commerce, where the statute or regulation itself lacked a substantial relationship to interstate commerce. To the contrary,

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[19] Though SWANCC's landfill would be *commercial*, it would not be *interstate*. The balefill would accept only municipal waste from SWANCC communities, processed at SWANCC's transfer station. *Supra*, p. 3. The local transport of local refuse to the local dump, under the auspices of local government, does not substantially affect interstate commerce. It is "completely internal." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824); see *United States* v. *Oregon State Med. Soc.*, 343 U.S. 326, 338-339 (1952) ("wholly intrastate" activities of medical plans were outside the commerce power, though plans made "sporadic and incidental" out-of-state payments); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 341-342 (1991) (Scalia, O'Connor, Kennedy, and Souter, JJ., dissenting).

the *Lopez* Court disregarded the fact that the challenged conduct there was indisputably commercial—the defendant had been paid $40 to deliver the gun to another student—when it held that GFSZA was outside the scope of the commerce power. See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993); *United States* v. *Lopez*, No. 93-1260, Brief for the United States at 7 (June 2, 1994). Similarly, the Corps' post hoc rationalization for applying the migratory bird rule in this case, and this case alone, should be rejected, given the total disconnect between the statutory and regulatory basis for asserting jurisdiction and the tie now asserted to commercial activity. The Corps, after all, is not regulating business; it is regulating waters that provide habitat for birds—a far cry from "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (1 Wheat.) at 194.[20]

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[20] This Court should also reject the Corps' claim that it has unbridled discretion to expand its own reach under the CWA by deciding for itself that a water or activity is within the commerce power. A delegation of this magnitude would not withstand constitutional review. See *supra*, Part I.D.2; *Loving* v. *United States*, 517 U.S. 748, 758 (1996) (Congress may not convey "the lawmaking function" to an administrative agency); *Guardians Ass'n*, 463 U.S. at 613-614 & n.2 (O'Connor, J., concurring). As Professor Tribe has noted, "[a]n agency exercising delegated power is not free, as is Congress itself, to exercise the full sweep of its authority to pursue any and all ends within the affirmative reach of federal legislative authority." 1 L. TRIBE, *supra*, at 982. This Court need not decide that constitutional question, however, for there is no evidence—much less the clear evidence required (*National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974); *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958))—that Congress meant the Corps to have sweeping quasi-legislative authority over waters unrelated to navigable waters.

C. Regulation Of Isolated Waters Used By Migratory Birds May Not Be Upheld On The Theory That Migratory Birds Travel Interstate

Several members of this Court have observed that the migratory bird rule appears to be based on an assumption that "the self-propelled flight of birds across state lines" is sufficient for federal regulation of their habitat. *Cargill*, 516 U.S. at 958 (Thomas, J.); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701, Tr. of Oral Argument 18-20 (Oct. 16, 1985). This argument presumably turns on Congress' power to "protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558; *Morrison*, 120 S. Ct. at 1749; see *Riverside Bayview*, Tr. of Oral Argument 18-19 (Assistant Solicitor General K. Oberly) (arguing that "the migration of birds is interstate commerce").

Congress, however, has no authority to regulate the environment of every person or thing that crosses a state line. Like migratory birds, people cross state lines frequently, yet this Court struck down VAWA, which was intended to protect against gender-based violence. *Morrison*, 120 S. Ct. at 1754. And in *Lopez*, this Court easily concluded that GFSZA was not a regulation of things in interstate commerce, though guns or their component parts frequently are transported interstate. 514 U.S. at 558. Similarly, regulation of the environment of migratory birds is not within Congress' power to protect things in interstate commerce.

To hold otherwise would allow the second *Lopez* category to swallow the other two categories and eliminate enforceable limits on federal power. Congress could "enact a federal law of torts covering any wrong done while wearing apparel any part of which had traveled interstate," or punish any crime that results in a loss of currency that has traveled interstate. 1 L. TRIBE, *supra*, at 831 n.29. Virtually any activity could be regulated under the guise of "protecting" a person, thing, or animal that travels interstate. These unthinkable results demonstrate the fallacy of relying on the interstate travel of birds as a sufficient constitutional basis for the migratory bird rule. See

Lopez, 514 U.S. at 567-568 (rejecting a conception of the Commerce Clause that eliminates the "distinction between what is truly national and what is truly local"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (same).

D. The Corps' Jurisdiction May Not Be Upheld Under The Treaty Power

The Corps and the court of appeals have identified international treaties and conventions, to which the United States is a signatory, that protect migratory birds. Br. in Opp. 21; Pet. App. 8a. These treaties are not a basis for upholding the migratory bird rule.

Article II, Section 2 of the Constitution provides that the President has "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." Under the Necessary and Proper Clause, Congress may enact legislation to carry out the Nation's obligations under its treaties. *Missouri* v. *Holland*, 252 U.S. at 432; *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901). The government has not suggested, nor could it, that Section 404 of the Clean Water Act was enacted pursuant to a treaty. *Cf.* 16 U.S.C. § 703; *id.* § 3901(b); *id.* § 4401(b).

In order to uphold the migratory bird rule under the treaty power, this Court would have to find that the treaty power gives the Executive authority to enforce by regulation the Nation's treaty obligations even when Congress had not passed legislation to do so. Under our constitutional system of separated powers, Congress, *not* an administrative agency, is given the authority to determine whether and how to legislate. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114 (1976); *Greene*, 360 U.S. at 507; *Kent*, 357 U.S. at 129; *National Cable Television Ass'n*, 415 U.S. at 341-342. The Corps may not invoke the treaty power to uphold a regulation where Congress has not legislated to enforce that treaty, and the challenged regulation is not promulgated pursuant to such a statute.

* * * * *

None of the rationales offered by the Corps provides a constitutional basis for asserting jurisdiction over isolated, water-filled mining trenches because they are (or could be) habitat for migratory birds. This result in no way threatens the federal government's ability to protect the environment, nor does it throw into doubt existing environmental laws.

Many environmental laws regulate commercial activity. See R. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 143-146 (1992). As such, they are clearly permissible under the commerce power. Furthermore, Congress has passed a plethora of environmental statutes, including numerous laws that protect birds and wetlands, under its spending, property, and treaty powers. See *Missouri*, 252 U.S. at 431-432; Strand, *Federal Wetlands Law: Part III*, 23 ENVTL. L. REP. 10,354 (1993). For example, this Court observed in *North Dakota*, 460 U.S. at 301-305, 309-310, that the United States, acting pursuant to the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.*, and the Migratory Bird Hunting Stamp Act, 16 U.S.C. § 718 *et seq.*, had by 1977 purchased "more than 276,000 acres of North Dakota land for use as migratory bird refuges" and bought easements over another 750,000 acres to preserve "'small wetland and pothole areas'" for "waterfowl habitats." The North American Wetlands Conservation Act, 16 U.S.C. § 4401 *et seq.*, authorizes the use of federal funds to acquire, restore, and manage federal and private land for conservation purposes, including conservation of migratory bird habitat. The Water Bank Act, 16 U.S.C. § 1301, authorizes federal payments to private landowners to implement conservation plans "to preserve and improve habitat for migratory wildfowl." See also, *e.g.*, Emergency Wetlands Resources Act, 16 U.S.C. § 3901 *et seq.* (creating sources of revenue for the migratory bird conservation fund and authorizing acquisition of additional wetlands to "fulfill international obligations contained in various migratory bird treaties" (*id.* § 3901(b)); Endangered Species Act, 16 U.S.C. § 1531(a)(4), (5); Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* In addition, some federal regulation of noncommercial activity with environmen-

tal consequences may be permitted if Congress determines that the regulated activities have a substantial relation to interstate commerce and makes findings to support its conclusion.

The vast scheme of federal environmental regulation would therefore be essentially untouched by a decision in this case invalidating asserted federal authority over completely isolated interstate waters used by migratory birds. In the end, the most significant effects of such a ruling may be to destroy the Corps' illusion that it has plenary land use planning authority, and to restore state environmental and land use regulation to the "primary" position that Congress manifestly intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS VILLAGE OF BARTLETT AND CITIZENS AGAINST THE BALEFILL

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QUESTIONS PRESENTED

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the United States Army Corps of Engineers to issue permits for the discharge of dredged or fill materials into "navigable waters," defined by the Act as "waters of the United States * * * ." 33 U.S.C. § 1362(7). In the instant case, the Corps determined that a series of permanent and seasonal ponds and small lakes on petitioner's property are "waters of the United States" because they are used as habitat for numerous species of migratory birds. The questions presented are as follows:

1. Whether the Corps' determination that the waters at issue are subject to its regulatory jurisdiction was based on a permissible construction of the Clean Water Act; and

2. Whether use of the waters as migratory bird habitat is a constitutionally sufficient basis for the exercise of federal regulatory jurisdiction.

RULE 29.6 STATEMENT

This brief is filed on behalf of respondents Village of Bartlett and Citizens Against the Balefill, intervenors below. The Village of Bartlett is an Illinois municipal corporation. Citizens Against the Balefill is a not-for-profit corporation organized under the laws of Illinois. It has no parent corporations, and no publicly held company owns stock in it.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States."

Certain relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act") are reproduced at Pet. App. 37a-38a. The relevant regulatory definitions and interpretations are reproduced at Pet. App. 39a-40a.

In addition, the Clean Water Act sets as its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and declares that one goal in achieving that objective is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife * * * ." 33 U.S.C. § 1251.

Section 47(b) of the Water Resources Development Act of 1988, 102 Stat. 4012 (reproduced at AR 38325, included with petitioner's lodging at Tab 3), provides that "Before issuing a permit under section 404 of the [Clean Water Act] for a proposed municipal landfill in the vicinity of Bartlett, Illinois, the Secretary [of the Army] shall consider the impact of such landfill on the Newark Valley Aquifer" and its implications for drinking water, in consultation with the United States Environmental Protection Agency, and "shall report to

Congress on the impact of such landfill on the Newark Valley Aquifer."[1]

STATEMENT OF THE CASE

1. Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the chief goals of the Act is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. § 1311(a), 1362(6) and (12)(A). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Conference Report accompanying the Act explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

[1] "AR" refers to the Administrative Record before the Corps. The Corps' decisions and the report to Congress mandated by the Water Resources Development Act of 1988 are reproduced in petitioner's lodging.

Under certain circumstances, discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404 of the Act, 33 U.S.C. § 1344. The Corps' original regulations limited the geographic scope of the Corps' authority to waters that were navigable-in-fact. After that narrow interpretation was rejected by the courts,[2] the Corps broadened them. The final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The regulation in its current form contains

[2] See, *e.g.*, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). Shortly after the decision in *Holland*, the House Committee on Government Operations expressed the view that the Corps' regulatory definition of "waters of the United States" was unduly narrow. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that the term be given the broadest possible constitutional interpretation." *Id.* at 27.

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

similar language. See 33 C.F.R. 328.3(a)(3).[4] Regulations promulgated by the Environmental Protection Agency (EPA) include a substantially identical definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the EPA had "clarified that waters of the United States" includes waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. Petitioner Solid Waste Agency of Northern Cook County (SWANCC) is an Illinois municipal corporation. It was initially comprised of 28 municipalities, but its membership later declined to 23 municipalities.

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[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

AR 15577. The site on which SWANCC proposed to put its balefill (a landfill for baled or bundled waste) was a 410-acre parcel in unincorporated Cook County near the towns of Bartlett (respondent herein), Elgin, and South Elgin, Illinois. AR 15573.

The site was a former gravel strip-mining operation that had been abandoned decades earlier, (AR 15691), and has since developed a remarkable natural character. It contains more than 200 ponds totaling over 55 acres (AR 12118), which seasonally form "an extensive labyrinth of open water" (AR 40334), and the Corps found it "difficult to separate the ponds from the wooded ridges, both physically and functionally." AR 17867. The site is a "mosaic of permanent, semi-permanent, and seasonal ponds interspersed with forested ridges" (AR 17867), and an "intermingled forest/open water habitat" (AR 15643), forming a "large, contiguous forested ecosystem" (AR 15691) such that "the entire wooded portion of the site * * * function[s] as a large, forested wetland complex." AR 15579.

In 1986, a SWANCC representative wrote to the Corps, asking whether the site contained protected wetlands. AR 34594. The Corps responded that it had found none, and that a section 404 permit thus would not be required. AR 34596. Similar correspondence – again focused only on the existence of wetlands, not the broader inquiry of "waters of the United States" – was exchanged in early 1987. AR 34598-99, 34609.

In July 1987, the Illinois Nature Preserves Commission (a State agency created by statute, *see* 525 ILCS 30/1 *et seq.*) asked the Corps to assert jurisdiction

over the site. The Commission urged that the Corps did have jurisdiction over the site based on the presence of "waters of the United States" and the use of the site and its waters by migratory birds. AR 34611-13. The Commission wrote:

> The balefill site is not currently being quarried and it meets the definition of waters of the United States as defined in [33 C.F.R.] 328.3 (a) and (b). Brief visit to the site by a member of our staff and a biologist from the Max MacGraw Wildlife Foundation resulted in the observation of a number of migratory bird species, including Wood Duck, Great-blue Heron, Green-backed Heron, and Killdeer. The presence of aquatic vegetation suggests that a more thorough investigation would yield additional wetland birds.
>
> * * * The Corps has been rightfully proud of its sensitivity to environmental concerns, and assuming jurisdiction of this site would be in keeping with this farsighted policy.

AR 34613.

After reviewing this request from the State agency, the Corps concluded in November 1987 that water areas of the site in fact qualified as "waters of the United States," and that a permit would thus be required before those water areas could be filled. The Corps based its determination on three criteria: "(1) that the proposed balefill site has been abandoned as a gravel pit; (2) that the water areas and spoil piles have developed a natural character; and (3) that the water

areas are or could be used as habitat by migratory birds which cross state lines." AR 34619.[5]

In November 1998, Congress passed the Water Resources Development Act of 1988, 102 Stat. 4012. Section 47(b) of that Act provided that "Before issuing a permit under section 404" of the Clean Water Act for the proposed SWANCC landfill, the Secretary of the Army was to consult with the United States Environmental Protection Agency and consider the impact on the Newark Valley Aquifer and on drinking water supplies. While the EPA's initial determination was that the project posed little risk (AR 38317-20), this view changed dramatically during the permitting process, as explained below.

3. SWANCC first applied for a section 404 permit in 1990. On an extensive record, the Corps denied the permit. AR 44682-44573 (tab 2 to petitioner's lodging). The Corps found *inter alia* that the proposed landfill "would eliminate a substantial portion of the existing habitat for a variety of woodland wildlife," including "documented habitat for several state endangered or threatened woodland birds normally associated with aquatic ecosystems," with "significant implications for the maintenance of viable populations of these species

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[5] The Corps also noted that SWANCC's earlier inquiries had been directed only to whether the water areas of the site qualified as wetlands or lakes, not to whether they fulfilled the broader definition of "waters of the United States." AR 34619. Eventually, the Corps concluded that the site indeed does contain actual wetlands. AR 10967-68, 15579, 15642-43, 15691.

in the region or state." AR 44678, 44714. In addition, the Corps found that SWANCC had failed properly to evaluate "many * * * potentially viable alternative sites." AR 44695-700, 44740.

In October 1992, SWANCC reapplied. On an even fuller record, in July 1994 the Corps again denied the permit. AR 15572-15847. The Corps noted that well in excess of 100 bird species were observed on the site, including several known to depend on aquatic environments for a significant portion of their life requirements, and many of which are known to migrate through portions of the United States. AR 15578. The Corps also concluded that the site contained jurisdictional wetlands of greater than one acre. AR 15579.

The Corps also noted the updated recommendation of the United States Environmental Protection Agency, which "recommended that the permit application be denied, based on the determination that the project * * * would have significant adverse impacts to waters of the United States and wildlife, and would pose a long term threat to groundwater resources." AR 15580.

> With regard to state water quality standards * * * the USEPA indicated its concern that the project site is inherently unsuitable for a project of this type due to the hazard of possible groundwater contamination of the Newark Valley Aquifer. They stated that while heroic engineering practices may make the design acceptable, the long-term maintenance requirements of the inward water flow gradient constitute a high risk situation with regard to the aquifer.

AR 15581.

The United States Fish and Wildlife Service likewise requested that the project be denied based on its finding that the site "constitutes a significant habitat for migratory birds * * * ." AR 15581-82. Three State of Illinois agencies, the Illinois Department of Conservation, the Illinois Nature Preserves Commission, and the Illinois Endangered Species Protection Board, expressed grave concerns about possible effects on area water supplies and on state-listed bird species. AR 15585-89.

The Corps noted that while the SWANCC project was supported by some Illinois municipalities (all of which were SWANCC members whose waste would be slated to go to the proposed balefill, and none of which are in close proximity to the site), it was opposed by many neighboring municipalities for a variety of reasons, including threats to the public water supplies and other potential environmental impacts. 15590-91.

4. SWANCC brought suit in federal district court pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, in 1994. The parties then filed cross-motions for summary judgment regarding the propriety of the Corps' assertion of jurisdiction over the site. SWANCC urged that the site was not subject to federal regulatory jurisdiction under the Commerce Clause because, as SWANCC put it, "[b]irds do not conduct commerce, people do." Pet. App. 17a. The district court noted holdings of several Courts of Appeals

upholding the so-called "migratory bird rule," and found that this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), did not place the regulation of intrastate migratory bird habitats beyond the reach of federal commerce clause jurisdiction. The district court noted that this Court in *Lopez* reaffirmed that the commerce clause "authorizes the federal government to regulate activities whose effect on interstate commerce is substantial only in the aggregate." Pet. App. 17a-23a. The court observed that migratory birds "have long been regarded as a proper subject for federal commerce clause regulation." Pet. App. 23a, citing *Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979).

The district court also rejected SWANCC's contention that the migratory bird rule exceeds the Clean Water Act's scope. Noting that the Act was, by its terms, enacted "to restore and maintain the chemical, physical, and biological integrity of this Nation's waters," including "the protection and propagation of fish, shellfish, and wildlife," and that the Act's legislative history likewise reveals Congress' intent to extend jurisdiction over waters to the maximum extent permitted under the Constitution, the district court concluded that 33 C.F.R. § 328.3(a)(3), as applied to intrastate migratory bird habitats, constituted a reasonable construction of the Clean Water Act. Pet. App. 29a-30a.

Upon the district court's grant of summary judgment on the jurisdictional point, SWANCC voluntarily dismissed the remainder of its suit in order to obtain a final judgment from which to appeal. Accordingly, as the court of appeals noted, "SWANCC has abandoned its challenge to the merits of the Corps' decisions and

has instead focused exclusively on its challenge to the migratory bird rule as a basis for the Corps' jurisdiction." Pet. App. 4a-5a. Thus SWANCC comes to this Court after having admitted for purposes of this case that the waters on this site constitute significant habitat for migratory birds, as well as that SWANCC's proposed landfill posed unacceptable risks for area groundwater.

The court of appeals affirmed the district court's jurisdictional finding. Pet. App. 1a-13a. The court rejected SWANCC's constitutional challenge, stressing that *Lopez* "expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a. The court noted that more than 3 million Americans spend more than a billion dollars annually to hunt migratory birds, with hundreds of thousands of those people crossing state lines to do so, and that many more millions of Americans engaged in interstate travel to observe birds. The court concluded:

> There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding

> is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Pet. App. 7a.

The court of appeals rejected SWANCC's argument that migratory bird habitat is of solely local interest, finding the argument "refuted by the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds, *North Dakota v. United States*, 460 U.S. 300, 309 (1983); see also *State of Missouri v. Holland*, 252 U.S. 416 (1920)." Pet. App. 8a.

The court of appeals also rejected SWANCC's argument that Corps jurisdiction based on migratory bird habitat exceeded Congress' grant of authority in the Clean Water Act. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." Pet. App. 9a. The court distinguished *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), where the court considered § 328(a)(3)'s application to waters whose degradation "could" affect interstate or foreign commerce. The court of appeals here found that the regulatory authority at issue was not based on *potential* impact on interstate commerce, but was instead founded on unchallenged facts (facts as to which SWANCC has abandoned any challenge) showing "an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a.

SUMMARY OF ARGUMENT

This case comes to the Court upon undisputed findings that the site at issue is of significant ecological value, that it acts as an actual habitat for several species of migratory birds, and that petitioner's proposed balefill would have significant effects on those birds, the ecosystem and the drinking water supply for neighboring communities, as expressed by federal and State agencies. It is on this basis that the Corps found, and the courts below confirmed, that these are "waters of the United States" within the meaning of the Clean Water Act, and that this application of the Act is well within the contours of the commerce power under this Court's teachings. These conclusions are unquestionably correct.

Both the express language and the legislative history of the Clean Water Act make clear that "navigable waters of the United States," defined by Congress to mean "waters of the United States," is intended to encompass far more than waters that are navigable-in-fact, and is intended to exercise the full reach of Congress' Commerce Clause power. The Corps' regulation providing that "waters of the United States" includes "other waters" whose "use, degradation or destruction" could affect interstate commerce, and the Corps' interpretation of that regulation to apply to waters that are used as habitat by birds that cross state lines or are protected by Migratory Bird Treaties is, at the least, a reasonable interpretation of Congress' directive, and one for which the agencies charged with the statute's administration are entitled to *Chevron* deference.

Moreover, in this case, Congress passed a specific statute, *after* the Corps determined that it had jurisdiction over the SWANCC site, directing the Corps to undertake certain analysis before deciding whether to grant a permit for that site under section 404 of the Clean Water Act. At a minimum, this demonstrates tacit Congressional approval of the assertion of Clean Water Act jurisdiction over this site.

The courts below were correct to find that the assertion of jurisdiction over petitioner's site was proper under the Commerce Clause. Migratory birds undisputably account for a significant measure of interstate commerce, and it is likewise undisputed that the deterioration of various isolated *intra*state waters that serve as migratory bird habitats can have devastating impacts on their ability to survive. Accordingly, protecting against the destruction of migratory bird habitats constitutes the regulation of intrastate activity that, viewed cumulatively, has a substantial impact on interstate commerce.

Perhaps more importantly, what is being regulated here is not the birds themselves, but the activities which threaten to harm those birds. Those activities are predominantly economic in nature, as can be seen from the legions of commercial organizations lined up as *amici* for petitioner. Those activities constitute "commerce" in even the narrowest sense of the word, and their impact on interstate commerce cannot reasonably be called into question.

Moreover, migratory birds that cross state lines, which have long been recognized as a proper subject for

federal statutes and treaties, are themselves things in commerce. This provides yet another basis for the proper application of Congress' powers under the Commerce Clause.

ARGUMENT

1. The Corps' Determination That the Waters on Petitioner's Site Are "Waters of the United States" Within the Meaning of the Clean Water Act Was Reasonable and Correct.

Petitioner's challenge to the intended scope of the Clean Water Act has already been answered in large part by this Court's unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, as here, a party sought to develop a parcel of property that did not contain "navigable waters" in the traditional understanding of the phrase. And there, as here, the party challenged the regulatory construction of "waters of the United States," which is the definition of "navigable waters" in the Clean Water Act.

The Court began by noting that the Corps' construction of the Act "is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." 474 U.S. at 131. Accordingly, the Court's role is simply to determine whether the Corps' interpretation "is reasonable, in light of the language, policies and legislative history of the Act * * * ." *Ibid.*

The Act, as made clear in its express wording, constituted "a comprehensive legislative attempt 'to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Ibid.* at 143, quoting 33 U.S.C. § 1251. Congress' objective "incorporated a broad, systemic view of the goal of maintaining and improving water quality," one that recognized the need for "broad federal authority to control pollution * * * ." *Ibid.*

Congress explicitly "chose to define the waters covered by the Act broadly." And the fact that Congress defined "navigable waters" as "waters of the United States" makes clear "that the term 'navigable' as used in the Act is of limited import." *Ibid.* at 133.

> In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."

Ibid. at 133.

Riverside Bayview likewise demonstrates the support for this broad construction in the Act's legislative history. Even more strikingly, it demonstrates that Congress considered opposition to the Act's broad jurisdictional grant in 1977, specifically debated cutting back on that grant, and then chose to retain the existing definition. *Ibid.* at 136-37. As Senator Baker reported in the Conference Committee's report, the legislation "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water

Pollution Control Act." *Ibid.* at 137, quoting 123 Cong. Rec. 29309.[6]

Petitioner brushes aside *Riverside Bayview*, and persists in its claim that because "waters of the United States" is a definition of "navigable waters of the United States," the Corps has impermissibly "written the term 'navigable waters' out of the Act" (Pet. Br. 14) and in doing so violated the "cardinal principle" that all words in a statute be given operative effect (Pet. Br. 17). Petitioner likewise claims that, contrary to *Riverside Bayview*'s holding, the Corps' interpretation of the Act is *not* entitled to judicial deference, since it raises constitutional questions and intrudes on traditional state powers. These arguments are all misplaced, and will be addressed in turn.

A. The Fact That "Navigable Waters" Is Defined to Be Broader than the Phrase's Traditional Understanding Supports the Corps' Interpretation.

Petitioner contends that "waters of the United States" cannot override "navigable waters of the United

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[6] If there were room for doubt on Congress' intent as to the application of the Act generally, there remains the fact that Congress, in passing the Water Resources Development Act of 1988, 102 Stat. 4012, specifically instructed the Secretary of the Army (a full year after the Corps asserted jurisdiction) to undertake certain studies "[b]efore issuing a permit under section 404" of the Act *for this site*. At a minimum, this is compelling evidence that Congress was untroubled by the Corps' assertion of jurisdiction over this site.

States," because the former phrase "is used to *define* the term 'navigable waters.'" Pet. Br. 16 (emphasis in original).

Implicit in petitioner's argument is either (1) that a statutory definition of a statutory term cannot trump the traditional understanding of the term defined; or (2) that a statutory definition of a statutory term cannot be *broader* than the term defined. Either way, petitioner is wrong. This Court has held on many occasions that a term defined in a statute must not be construed contrary to the definition. *See, e.g., Meese v. Keene*, 481 U.S. 465, 484-85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"). Moreover, this rule has frequently been applied where the definition is broader than the traditional understanding of the term being defined. In *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947), the Court found that the term "employees" as defined in the Fair Labor Standards Act was broader than its traditional legal understanding, since that Act "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." Likewise, in *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935), Standard Oil complained that its filling stations could not constitute "stores" as commonly understood, even though the term "store" was defined broadly in the statute at issue. Justice Cardozo wrote for the Court:

> We are told that the average man, if requested to point out to a stranger the store nearest

> by * * * , would not be likely to think of a filling station as within the range of the inquiry. There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has * * * suppl[ied] its own glossary. * * * In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.

294 U.S. at 95-96 (footnote and citations omitted).

The Corps' reliance on Congress' definition of "navigable waters," rather than on some other understanding, is plainly correct, and it is petitioner's contrary position that does violence to fundamental rules of construction.

B. The Corps' Interpretation of the Act Is Not Deprived of its Entitlement to Judicial Deference by the Doctrine of Constitutional Doubt.

This Court ruled in *Riverside Bayview* that under *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985), and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), its review of the Corps' interpretation of the Clean Water Act is "limited to the question whether [that interpretation] is reasonable, in

light of the language, policies, and legislative history of the Act * * * ." 474 U.S. at 131. And the Court so held after refuting the court of appeals' position "that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment." *Ibid.* at 126.

Notwithstanding *Riverside Bayview*, petitioner argues that deference is inappropriate because of another rule of construction, that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of the Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[7] Petitioner's attempt to apply this "constitutional doubt" rule in this case suffers from two problems: First, as the court of appeals determined, and as demonstrated further below, the Corps' application of the Act *does not* raise serious constitutional problems, and the Corps' exercise of regulatory jurisdiction here is well supported by Commerce Clause rulings from this Court dating back to the nineteenth century.

Second, the "constitutional problems," such as they are, cannot be avoided where the statutory construction urged "is plainly contrary to the intent of Congress."

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[7] The doctrine is one of avoidance that "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears to uphold the Constitution." *DeBartolo*, 485 U.S. at 575.

DeBartolo, 485 U.S. at 575. Thus a doctrine designed to avoid *unnecessary* constitutional adjudications cannot readily be applied where the statute, by its terms and its history, was intended by Congress to extend federal jurisdiction as far as the Constitution permits. The Conference Report accompanying the Act explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972); *see also Riverside Bayview*, 474 U.S. at 137 (noting legislative history that the Act as amended in 1977 retained "comprehensive jurisdiction over the Nation's waters"). *See* Pet. App. 9a (court of appeals finding it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows"); *Leslie Salt Co. v. United States,* 896 F.2d 354, 357 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1126 (1991).

If one accepts that Congress intended to exercise the full extent of its Commerce Clause powers (as the statute, its legislative history and court authority confirm), then it would do violence to Congress' intent to hold that anytime a substantial question is raised about the constitutionality of a particular application, the statute must be interpreted so as to *avoid* the question; one cannot give effect to Congress' intent to *exercise* its most comprehensive powers by automatically answering every close question about the extent of those powers in the negative. And in fact, when this Court has concluded that Congress intended to exercise its full power under the Commerce Clause, it has not

shrunk from the task of determining whether a particular application of federal authority exceeds that power. *See Russell v. United States*, 471 U.S. 858, 859-62 (1985) (unanimous holding that federal arson statute, by which Congress intended to exercise its full power under the Commerce Clause, was properly applied to apartment unit made available for local rental); *Andrus v. Allard*, 444 U.S. 51, 55-57 & n.4 (1979) (regulations promulgated by Secretary of Interior applying Eagle Protection Act and Migratory Bird Treaty Act found proper in light of statutes' "broad proscriptive provisions" and legislative history, despite Court's explicit finding that the regulations raised a substantial issue under the Fifth Amendment).

2. The Regulation of Intrastate Waters Used as Migratory Bird Habitat is Within Congress' Power Under the Commerce Clause.

There is no dispute that petitioner's site in fact serves as habitat for many species of migratory birds.[8] (Nor could it be disputed, since petitioner voluntarily dismissed its challenge to the issue in order to take its appeal.) There is likewise no dispute that the very existence of migratory birds that engage in interstate

[8] Accordingly, this case, involving actual birds in actual habitats, is unlike the one described in Justice Thomas' dissent from the denial of *certiorari* in *Cargill, Inc. v. United States*, 516 U.S. 955, 955-96 (1995) (describing jurisdiction premised solely on "the actual or potential presence" of such birds); *ibid.* at 956-97 (questioning whether "potential or actual existence" of migratory birds could give rise to jurisdiction); *ibid.* at 958 (jurisdiction over "any waters that might serve as a potential habitat").

travel is profoundly threatened by the degradation of habitat, the bulk of which exists within individual states. *See State of Missouri v. Holland*, 252 U.S. 416, 435 (1920) (in light of migratory birds' transitory presence within individual States, "It is not sufficient to rely upon the States").

The question, then, is whether the commerce power is exceeded where petitioner, which is seeking to engage in commercial activity, is regulated when its proposed activity threatens wildlife that travels interstate, despite the fact that Congress has acted to protect wildlife, and despite the fact that human activities devoted to the threatened wildlife add up to more than a billion dollars of commerce each year, much of it spent by people who themselves travel interstate to engage in those activities.[9]

It is, respectfully, difficult to miss the commerce in this picture. While petitioner and supporting *amici* apparently hope that *Morrison v. United States*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), portend a radical departure from this Court's established Commerce Clause jurisprudence, the federal authority being exercised here was well

[9] It is clear that the operation of landfills (the bulk of whose contents undoubtedly moved in interstate commerce) constitutes "commerce" under virtually any definition of the term, and is well within Congress' power to regulate. *See, e.g., Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994); *United States v. Rogers*, 685 F. Supp. 201 (D. Minn. 1987) (upholding Resource Conservation and Recovery Act against Commerce Clause challenge).

within the bounds of the commerce power as described in *Morrison* and in *Lopez*.

As the Court stated in *Morrison*, modern Commerce Clause jurisprudence has identified "three broad categories of activity that Congress may regulate under its commerce power." 120 S. Ct. at 1749. Congress may regulate (1) the channels of interstate commerce, (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce, * * * *i.e.*, those activities that substantially affect interstate commerce." *Ibid.* at 1749 (internal quotations omitted; ellipses in *Morrison).*

Any way one frames this – in view of the birds (wildlife that itself travels interstate), the people who travel interstate to observe and hunt those birds, the dollars those people spend in pursuit of those birds, the commercial activity in which petitioner wishes to engage, or the national scope of the environmental evils that Congress chose to address (and address in a manner giving due recognition to the delicate and intertwined nature of ecosystems, *see Riverside Bayview*, 474 U.S. at 132-33) – it fits comfortably within this Court's Commerce Clause jurisprudence.

A. Migratory Birds Generate Significant Interstate Commercial Expenditures, and Protecting That Commerce Requires the Regulation of Intrastate Activity.

As the court of appeals noted, *Lopez* "expressly recognized, and in no way disapproved, the cumulative

impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a. The same is clearly true for *Morrison*.

We will not belabor this Court with another iteration of the court of appeals' holding. It will suffice to note that it is unchallenged that millions of interstate travelers spend more than a billion dollars annually to hunt or observe migratory birds. Protecting the focus of that commerce must surely be within Congress' power to regulate "those activities having a substantial relation to interstate commerce." *Morrison*, 120 S. Ct. at 1749.

B. The Fact That the Migratory Birds Being Protected Themselves Engage in Interstate Travel Is an Independent Basis for Their Protection under Congress' Commerce Power.

Morrison reaffirmed that Congress' commerce power extends to the regulation of "persons or things in interstate commerce, even though the threat may come only from intrastate activities." 120 S. Ct. at 1749.

Migratory birds, by definition, routinely transport themselves across state lines. Moreover, "it is settled beyond question that the transportation of persons [across state lines] is 'commerce' within the meaning of" the Commerce Clause. *Edwards v. California*, 314 U.S. 160, 172 (1941); *see also Camps Newfound/Owatonna v.*

Harrison, Maine, 520 U.S. 564, 584 (1997). It has likewise been held "immaterial whether or not the transportation is commercial in character." *Edwards*, 314 U.S. at 172 n.1. *See United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) ("the Supreme Court has repeatedly said crossing state lines is interstate commerce regardless of whether any commercial activity is involved"), *cert. denied*, 523 U.S. 1053 (1998). Accordingly, migratory birds are "things in interstate commerce," and, like people in interstate commerce, their protection is within Congress' commerce power. *See United States v. Bailey*, 115 F.3d 1222, 1228 (5th Cir. 1997) (upholding Child Support Recovery Act, finding that child support obligation for out-of-state child is "itself a thing of commerce that has acquired an interstate character"), *cert. denied*, 522 U.S. 1082 (1998); *accord United States v. Black*, 125 F.3d 454, 460 (7th Cir. 1997) ("[t]hat a support obligation is intangible and that payments under it may only amount to a transfer of electrons across state lines is immaterial"), *cert. denied*, 523 U.S. 1033, 1130 (1998).

C. The Commerce Clause Permits Congress to Address Matters of Uniquely National Concern, and the Matters Regulated Here Are Predominantly Commercial.

Petitioner argues that the activity proscribed by the Clean Water Act – adding a "pollutant" (including fill material) – into water is not "inherently economic or commercial." Pet. Br. 37. Petitioner criticizes the Corps for noting that the prevention of harms to migratory birds has long been an issue of national concern (Pet. Br. 38), concluding, rather flippantly, "The last time we

checked, there was no 'national concern' clause in the Constitution." Pet. Br. 39.

No, there is no "national concern" clause, but this Court has long worked to ensure – out of concern for the nation, no doubt – that when Congress reasonably determines that non-economic issues can be effectively addressed only at the national level, those determinations are not judicially overruled based on a crabbed reading of the Commerce Clause.

Virtually no act of pollution is "*inherently* economic or commercial," and yet this Court has held unanimously that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Mining & Reclam. Assoc., Inc.*, 452 U.S. 264, 282 (1981).[10]

Nor do environmental concerns constitute the only area in which it has long been accepted that Congress has the power to regulate activities that may not always be economically motivated, but that logic and history suggest must be handled at the national level. The Commerce Clause constitutes "a positive power. It is the power to legislate concerning transactions which,

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[10] While the activity being regulated in *Hodel* – the aftermath of strip-mining – involved the production of coal, a commodity that moves in interstate commerce, the same can be said for the waste that SWANCC would like to dump on the site. Moreover, the Court's conclusion that the Commerce Clause gives Congress the power to regulate activities that may cause environmental hazards in more than one State was an independent ground for its holding.

reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552 (1944). Thus we have the Child Support Recovery Act, 18 U.S.C. § 228, regulating the non-payment of interstate child support obligations, *see United States v. Black*, 125 F.3d 454 (7th Cir. 1997), as well as federal laws to govern crossing state lines with the intent to disrupt an animal enterprise, 18 U.S.C. § 43, to avoid state-court prosecution, 18 U.S.C. § 1073, in aid of unlawful activity, 18 U.S.C. § 1952, with the intent to start a riot, 18 U.S.C. § 2101, or to engage in a sexual act with a minor, 18 U.S.C. § 2423(b), *see United States v. Wright*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 523 U.S. 1053 (1998). And thus, as noted in *United States v. Bailey*, 115 F.3d 1222, 1228 n.7 (5th Cir. 1997), this Court has held "that it is interstate commerce to transport a woman from one state to another in a common carrier, *Hoke v. United States*, 227 U.S. 308, 320-23 (1913); to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States v. Simpson*, 252 U.S. 465, 467 (1920); and to transmit information over interstate telegraph lines, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. (6 Otto) 1, 11 (1877)." The Court has also held that the Associated Press' not-for-profit newsgathering activities constituted "commercial intercourse * * * within the meaning of the Constitution." *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937) cited in *Bailey*, 115 F.3d at 1228.

Few if any of these activities are "inherently" economic (although, like petitioner's proposed discharge of pollutants into waters, they are economic in many instances), and yet all have been viewed as proper subjects of Congress' commerce power. Moreover, inquiring whether an issue is of uniquely national concern is simply another way of inquiring "whether the exercise of national power seeks to intrude upon an area of traditional state concern," which has been seen as a legitimate basis for evaluating the scope of the commerce power. *Lopez*, 514 U.S. 549, 580 (Kennedy, J., concurring). And the protection of migratory birds, like the protection of the environment more generally, has long been recognized as "a national interest of very nearly the first magnitude * * * ." *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920).[11]

Finally, petitioner's complaint that discharging into waters as defined in the Clean Water Act is not *inherently* economic does not do much to disguise that what is regulated under section 404 of the Act is *predominantly* economic.

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[11] The migratory bird "is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States." *Ibid*. *See also North Dakota v. United States*, 460 U.S. 300, 309-310 (noting treaties that obligate the United States to preserve and protect migratory birds and their habitats).

This is, as is often true in environmental policy disputes, a case involving the balance between preserving the environment and exploiting it for commercial purposes. It is not our goal to assert here, nor is it this Court's role to decide, how that balance should be drawn, since doing so is plainly a legislative judgment. But just as it is said that you can tell a lot about a person by the friends he keeps, you can tell a lot about petitioner's case by the *amici* it attracts. One need only review the long list of *amici* supporting petitioner – a list including mining and quarrying interests, steel and wood producers, homebuilding interests, cattle-marketing interests, farming interests, and the aptly named Chamber of Commerce of the United States of America – to recognize that what is at issue here is commerce on a national level.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

Section 404 of the Federal Water Pollution Control Act Amendments of 1972, as amended (Clean Water Act), 33 U.S.C. 1344, authorizes the United States Army Corps of Engineers to issue permits for the discharge of dredged or fill material into "navigable waters," defined by the Act as "waters of the United States," see 33 U.S.C. 1362(7). In the instant case, the Corps determined that a series of permanent and seasonal ponds and small lakes on petitioner's property are "waters of the United States" because they are used as habitat by numerous species of migratory birds. The questions presented are as follows:

1. Whether the Corps' determination that the waters at issue are subject to its regulatory jurisdiction is based on a permissible construction of the Clean Water Act.

2. Whether use of the waters as migratory bird habitat is a constitutionally sufficient basis for the exercise of federal regulatory jurisdiction.

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Thomas Dahl, U.S. Dep't of the Interior, *Wetlands Losses in the United States 1780's to 1980's* (1990)	40
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Environmental Policy Div., Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of 1972* (1973)	21-22
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H.R. Rep. No. 1396, 93d Cong., 2d Sess. (1974)	3
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National Research Council, *Wetlands: Characteristics and Boundaries* (1995)	41
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 14, 2000, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA) "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the goals of the CWA is

to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. Regulations implementing the Corps' Section 404 permitting authority were first published in 1974. 39 Fed. Reg. 12,115. Those regulations defined the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). See also 33 C.F.R. 209.260(e)(1) (1974) (explaining that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor").

The Corps' initial view of the scope of its Section 404 jurisdiction met with substantial opposition. Several federal courts considering the coverage of wetlands adjacent to other waters held that the Corps had given Section 404 an unduly restrictive reading. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). The

court in *Holland* examined the text and history of the CWA, *id.* at 671-672, as well as this Court's precedents construing the Commerce Clause, and concluded that "Congress had the power to go beyond the 'navigability' limitation in its control over water pollution and that it intended to do so." *Id.* at 673. The Environmental Protection Agency (EPA) and the House Committee on Government Operations expressed agreement with the decision in *Holland*.[1] In *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used

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[1] EPA expressed the view that "the *Holland* decision provides a necessary step for the preservation of our limited wetland resources," and that "the [*Holland*] court properly interpreted the jurisdiction granted under the [CWA] and Congressional power to make such a grant." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works*, 94th Cong., 2d Sess. 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). EPA explained that it "firmly believe[d] that the Conference Committee deleted 'navigable' from the [CWA] definition of 'navigable waters' in order to free pollution control from jurisdictional restrictions based on 'navigability.'" *Id.* at 350. Shortly thereafter, the House Committee on Government Operations discussed the disagreement between the two agencies (as reflected in EPA's June 19 letter) and concluded that the Corps should adopt the broader view of the term "waters of the United States" taken by EPA and by the court in *Holland*. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that this term be given the broadest possible constitutional interpretation." *Id.* at 27 (internal quotation marks omitted).

EPA administers the CWA except as otherwise explicitly provided. 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the term 'navigable waters' for purposes of § 404" resides with EPA. 43 Op. Att'y Gen. 197 (1979).

in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the district court's order in *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters (sometimes referred to as "isolated waters") that are not connected by surface water or adjacent to traditional navigable waters. 33 C.F.R. 209.120(d)(2)(i) (1976).[2] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122. The 1977 final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The Corps' current regulation

[2] Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 Fed. Reg. 31,321, 31,324, 31,326 (1975). Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 31,325; see also 42 Fed. Reg. 37,124 (1977) (describing the three phases).

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

contains similar language, see 33 C.F.R. 328.3(a)(3),[4] and EPA has promulgated regulations that include a substantially identical definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3); 40 C.F.R. 232.2; 40 C.F.R. 122.2.

In 1977, Congress considered a legislative proposal that would have limited the class of waters subject to the Corps' permitting authority under Section 404 of the CWA. A bill passed by the House of Representatives provided that for purposes of Section 404, the Corps' permitting authority would extend to navigable waters "and adjacent wetlands," with the term "navigable waters" defined to mean waters navigable in fact, or capable of being made so by "reasonable improvement." 123 Cong. Rec. 10,420 (1977); see *id.* at 10,434 (passage of bill). A similar amendment was defeated in the Senate, however, see *id.* at 26,728, and the provision to redefine the term "navigable waters" was eliminated by the Conference Committee, see H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 97-105 (1977).[5]

[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

[5] Although Congress declined to diminish the geographic scope of the Corps' regulatory jurisdiction, it amended Section 404 in significant respects. *Inter alia*, the 1977 Act, Pub. L. No. 95-217, 91 Stat. 1566, established a mechanism by which a State may assume responsibility for administration of the Section 404 program with respect to waters "other than" traditional navigable waters and their adjacent wetlands. 33 U.S.C. 1344(g)(1). The 1977 legislation also exempted specified activities—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See 33 U.S.C. 1344(f).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In the preamble to the regulations, the Corps observed that EPA had "clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. a. Petitioner is a consortium of Illinois municipalities formed for the purpose of locating and developing a disposal site for nonhazardous waste. Pet. App. 1a-2a. Petitioner owns a 533-acre parcel of land in Cook and Kane Counties, Illinois, on which it proposed to locate a solid waste landfill. *Ibid.* The project site is 410 acres in size, 298 acres of which is an "early successional stage forest." *Id.* at 2a. Although the site was used 50 years ago for surface mining, it has evolved to include "over 200 permanent and seasonal ponds * * * rang[ing] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.* The site functions as a single aquatic ecosystem, *i.e.*, "a large wooded wetland complex." Pet. C.A. App. 72 (Administrative Record (A.R.) 16,793); see also Fed. C.A. App. 31 (A.R. 15,691) ("[T]he aquatic areas are part of a large, contiguous forested ecosystem."); Fed. C.A. App. 296 (A.R. 44,708). The site is also located directly above an aquifer that supplies drinking water to the region. Fed. C.A. App. 89, 94-102 (A.R. 15,748, 15,753-15,761); Pet. C.A. App. 93 (A.R. 15,581).

The ponds on petitioner's land are inhabited by a wide variety of aquatic wildlife, including such fish as largemouth

bass, carp, bluegill, and black crappie; five species of toads and frogs; two turtle species; and several salamander species. A.R. 40,302, 40,364. In addition, 121 different species of birds have been observed on the project site, including species that "depend on aquatic environments for a significant portion of their life requirements" and "migrate through portions of the United States." Pet. C.A. App. 90 (A.R. 15,578); see also Fed. C.A. App. 6-10 (A.R. 2464-2468) ("Master List of Bird Species Known to Use the Balefill Site"). "Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp [sparrows], redwinged blackbirds, tree swallows, and several varieties of herons." Pet. App. 3a. Each of the above-listed species is on the list of migratory bird species protected under international treaties. See 50 C.F.R. 10.13. "[T]he site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Pet. App. 3a. In addition, the ponds provide breeding habitat for several bird species that have been listed as threatened or endangered by the Illinois Endangered Species Protection Board, including the Veery and the Cooper's Hawk, which require isolated aquatic habitats for breeding. Pet. C.A. App. 99-100 (A.R. 15,587-15,588); Fed. C.A. App. 191, 288 (A.R. 16,383, 40,418). More than 50 species of birds are known to breed on the site. *Ibid.*; see also Fed. C.A. App. 285 (A.R. 40,415).[6]

b. Petitioner's proposed landfill would involve the filling of approximately 17.6 acres of the ponds and small lakes on its property. Pet. App. 3a, 15a. The Corps initially concluded that the site did not contain any "waters of the United States" subject to its regulatory jurisdiction. See Pet. C.A. App. 60-61. After receiving evidence from the

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[6] The site also provides habitat for 30 mammal species and 200 plant species. Pet. C.A. App. 92-93 (A.R. 15,580-15,581).

Illinois Nature Preserves Commission, however, the Corps found that the water bodies on petitioner's property are "waters of the United States" because, *inter alia*, "the water areas are used as habitat by migratory bird[s] which cross state lines." *Id.* at 90 (A.R. 15,578); see also Pet. App. 3a-4a, 15a-16a. Petitioner subsequently applied to the Corps for a Section 404 permit to fill those waters.[7] See Pet. C.A. App. 85-86 (A.R. 15,573-15,574); Pet. App. 3a-4a, 16a.

In July 1994, after an extensive public review process and input from numerous local, state, and federal agencies, the Corps denied petitioner's permit application. Pet. C.A. App. 84-171 (A.R. 16,672, 15,573-15,659); Pet. App. 4a, 16a. The Corps based the permit denial on its findings that (1) the filling of the ponds and other waters on the site would eliminate habitat for numerous species of birds and other wildlife, Pet. C.A. App. 155-157 (A.R. 15,643-15,645); Fed. C.A. App. 32-40 (A.R. 15,692-15,700); (2) petitioner had failed to examine available alternatives to the proposed landfill that would be less environmentally damaging, Pet. C.A. App. 170 (A.R. 15,658); and (3) the project poses "an unacceptable risk to the public's drinking water supply" due to the possibility that leachate from the landfill could contaminate groundwater aquifers, Pet. C.A. App. 171 (A.R. 15,659).

The Corps found that the site is especially important as wildlife habitat due to the loss of similar wooded aquatic habitats in the region. Pet. C.A. App. 155 (A.R. 15,643); Fed. C.A. App. 33 (A.R. 15,693). It noted the views of some

[7] As noted above (see note 5, supra), the CWA in its current form provides a mechanism by which a State may assume responsibility for administration of the Section 404 program with respect to waters "other than" traditional navigable waters and their adjacent wetlands. 33 U.S.C. 1344(g)(1). Two States—Michigan and New Jersey—have submitted and obtained approval of their own programs for partial administration of the Section 404 program. See 40 C.F.R. 233.70, 233.71. Because Illinois has not assumed that function, administration of Section 404 with respect to the waters at issue in this case remains the responsibility of the Corps.

experts that "[m]uch of the current severe drop in area-sensitive bird populations is blamed on habitat destruction." *Ibid.* The Corps' assessment was based in part on the recommendation of the United States Fish and Wildlife Service (FWS), which conducted an extensive analysis, see Fed. C.A. App. 190-198 (A.R. 16,382-16,390), and concluded that "[b]ecause of its value to migratory birds, we do not believe this site is an appropriate place to site a landfill." *Id.* at 197 (A.R. 16,389); see Pet. C.A. App. 93 (A.R. 15,581) (Corps' decision document notes the FWS's recommendation).[8]

3. Petitioner sought review of the Corps' decision in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 14a. Petitioner challenged both the Corps' assertion of regulatory jurisdiction and the merits of the permit denial. *Id.* at 1a. The district court granted summary judgment for the government on the issue of CWA jurisdiction. *Id.* at 14a-36a. Petitioner then consented to dismissal with prejudice of its remaining claims, and the district court entered final judgment in favor of the government. *Id.* at 2a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court observed that petitioner had "abandoned its challenge to the merits of the Corps' decisions and ha[d] instead focused exclusively on its challenge to" the Corps' assertion

[8] FWS explained that "the project has a high probability of adversely affecting breeding habitat of area-sensitive migratory birds, and will likely result in the abandonment of the site by breeding great blue herons." Fed. C.A. App. 190 (A.R. 16,382). It observed that "[h]abitat area requirements for forest birds in the midwest are scarce or lacking," *id.* at 192 (A.R. 16,384), and that preservation of existing sites is accordingly important. The FWS acknowledged "the enormity of the solid waste disposal problem and * * * [the Corps'] mandate to balance competing interests" but stated that "the continued incremental loss of significant habitat for species of concern and its implication for the long-term preservation of biological diversity is a societal problem on par with solid waste disposal." *Id.* at 197 (A.R. 16,389).

of regulatory jurisdiction. *Id.* at 4a. The court therefore "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

a. The court of appeals rejected petitioner's contention that "Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone." Pet. App. 5a. Prior to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the court explained, "it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds." Pet. App. 5a (citing cases). The court found that *Lopez* had not undermined that rule. It observed that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a.

The court summarized statistical evidence showing that Americans engage in frequent interstate travel and spend substantial sums of money in order to hunt and observe migratory birds. Pet. App. 7a. It concluded that

> the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Ibid. The court also stated that "the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national

interest of very nearly the first magnitude' in protecting such birds," refuted petitioner's contention that the protection of migratory bird habitat is a matter of purely local concern. *Id.* at 8a (quoting *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983)).

b. The court of appeals rejected petitioner's argument that the Corps' exercise of regulatory jurisdiction exceeded its authority under the CWA. The court observed that the construction of the statutory term "waters of the United States" utilized by the Corps and EPA is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet App. 9a. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Ibid.* (citing cases). It concluded that, "[b]ecause Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner." *Id.* at 10a. The court of appeals also observed that in the present case, "the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats." *Ibid.*

SUMMARY OF ARGUMENT

A. The Corps and EPA have reasonably asserted CWA regulatory jurisdiction over all surface water bodies the degradation of which can be expected to affect interstate commerce.

1. By using the term "waters of the United States," Congress signaled its intent that the CWA's coverage is not limited by traditional conceptions of navigability. That conclusion is reinforced by other textual provisions, which declare the Act's purposes to include protection of fish and

wildlife and require the Corps to consider a broad range of interests in evaluating permit applications. And, significantly, Congress amended the CWA in 1977 to authorize States to administer the Section 404 program for waters "other than" traditional navigable waters and their adjacent wetlands. That provision would be meaningless if the Corps' jurisdiction were limited to traditional navigable waters.

2. The legislative history of the 1972 Act suggests that the CWA's coverage does not depend upon the suitability of particular waters for commercial traffic. By 1977, moreover, the Corps had asserted regulatory jurisdiction over "isolated" waters whose destruction could affect interstate commerce. During the debates on the 1977 amendments, the propriety of the Corps' assertion of jurisdiction over "isolated" waters was a principal subject of congressional concern. Legislative proposals that would have restricted the Corps' jurisdiction to traditional navigable waters and their adjacent wetlands were passed by the House and introduced in the Senate, but Congress ultimately declined to enact any such measure. Congress chose instead to counterbalance Section 404's extensive geographic reach by authorizing partial administration of the Section 404 program by the States, and by exempting specified activities from Section 404's permit requirements. Congress's refusal to overrule the Corps' construction of the CWA, together with its enactment of a new statutory provision that presumed the correctness of the existing regulatory definition, shows the reasonableness of the Corps' approach.

3. The Corps' interpretation of the phrase "waters of the United States" is entitled to deference, since the phrase is neither an established term of art nor one with an obvious "plain meaning." The Corps and EPA reasonably chose to employ a jurisdictional standard that turns on the prospect of interstate effects resulting from water pollution, rather than on a particular causal mechanism (surface water connections to traditional navigable waters) by which those

effects are produced. That approach is consistent with the text and history of the statute, with established administrative law precedents, and with principles of federalism.

B. The Corps' assertion of regulatory jurisdiction over "isolated" waters used as habitat by migratory birds is constitutional.

1. This Court has emphasized that limits on Commerce Clause authority serve ultimately to ensure that Congress does not assume a general police power or usurp functions more appropriately exercised by the States. The Court has long recognized, however, that the protection of migratory birds is primarily entrusted to the federal government because it is a task inherently unsuited to piecemeal accomplishment. The protection of suitable habitat is an integral feature of federal efforts to conserve migratory birds. Reaffirmation of federal power to protect migratory bird habitat is fully in keeping with traditional conceptions of the distinction between national and local spheres of authority.

2. The proposed activity for which petitioner sought a permit is commercial in character, and it would have a substantial impact on the bird species that use the area for habitat. The Court's inquiry should focus on the facts of this case, rather than on hypothetical applications of the Corps' jurisdictional rule to non-economic conduct. That approach is especially appropriate because the loss of migratory bird habitat has been caused overwhelmingly by commercial activities. Moreover, the Corps' rule is in terms self-limiting to applications within the commerce power.

3. The destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce. Bird hunting and bird watching activities each generate billions of dollars of commerce each year. Protection of national economic resources from the ill effects of local commercial activity is well within Congress's authority under the Commerce Clause.

ARGUMENT

This Court has recognized that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). The CWA reflects Congress's recognition that the degradation of water resources in one State may have significant interstate effects. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325-326 (1981) (explaining that the CWA provides a variety of mechanisms by which a State whose waters may be affected by a pollutant discharge in another State can participate in the permitting process). In defining the statutory term "waters of the United States," the Corps and EPA have identified categories of waters the degradation of which can be expected to cause significant harms in States other than that in which the pollution occurs.

The potential for interstate harm, and the consequent need for federal regulation, is particularly clear with respect to water bodies that span more than one State. It could not plausibly be contended, for example, that Illinois authorities should have the final say regarding the circumstances under which pollutants may be placed into the Mississippi River in Illinois. Indeed, long before the enactment of the CWA, the Water Pollution Control Act, ch. 758, § 2(d)(1), provided a federal mechanism for abatement of "[t]he pollution of interstate waters in or adjacent to any State or States * * * which endangers the health or welfare of persons in a State other than that in which the discharge originates." 62 Stat. 1156; see also *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 102-108 (1972) (holding, prior to enactment of the CWA, that Illinois could assert a federal common-law cause of action to abate the pollution of Lake Michigan by a

municipality in another State).[9] Consistent with that longstanding federal policy, the Corps defines the term "waters of the United States" to include "[a]ll interstate waters including interstate wetlands." 33 C.F.R. 328.3(a)(2).

As petitioner recognizes (Br. 15-16), Congress also has well-established authority to regulate and protect water bodies that are located entirely within a single State but that provide actual or potential channels for interstate commercial traffic. The authority to protect such waterways is simply one aspect of Congress's power to "regulate the use of the channels of interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). The Corps' regulation defines the term "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. 328.3(a)(1).

The Corps' regulation further recognizes that water pollution can affect national interests even where the waters in question are located entirely within a single State and are unsuitable for use as avenues for commerce. Thus, the Corps defines the term "waters of the United States" to include (in addition to the categories described above) "[a]ll other waters * * * the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). The Corps has not purported to offer a comprehensive list of the circumstances under which degradation of so-called "isolated" waters can be expected to

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[9] The Court has since held that the CWA preempts a federal common-law cause of action for interstate harms caused by water pollution, on the ground that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee* v. *Illinois*, 451 U.S. at 317.

have the requisite effect on interstate or foreign commerce.[10] It has, however, expressed the view that intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," or "[w]hich are or would be used as habitat by other migratory birds which cross state lines," fall within the coverage of Section 328.3(a)(3). See 51 Fed. Reg. 41,217 (1986).

Taken as a whole, the Corps' regulation reflects an effort to identify categories of waters the degradation of which can be expected to have significant interstate effects, making protection of the relevant waters an appropriate subject of federal concern. The effect of identifying particular waters as "waters of the United States," it should be emphasized, is not to impose an absolute prohibition on the discharge of pollutants (including dredged and fill material). It is instead to ensure that such discharges will not be made without a federal permit. The Corps reasonably adopted a broad definition of the term "waters of the United States" in order to ensure that waters having potential interstate significance are not destroyed or degraded without a prior assessment of

[10] The term "isolated waters" is potentially misleading. The term is commonly used to refer to waters that are remote from and lack any surface connection to navigable waters as traditionally defined. See 33 C.F.R. 330.2(e). Even so-called "isolated waters," however, may have other hydrologic connections to, and affect the quality of, traditional navigable waters. "Isolated" waters may, for example, have groundwater connections to other waters. Many "isolated" waters also play an important role in flood control and erosion control, reducing the size and duration of floods by providing storage basins in flood prone areas. See generally Virginia Carter, *Wetland Hydrology, Water Quality, and Associated Functions*, *in* United States Geological Survey, *National Water Summary on Wetland Resources* 44 (1996); Thomas Dahl & Craig Johnson, U.S. Dep't of the Interior, *Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's* at 3 (1991); Fish and Wildlife Serv., U.S. Dep't of the Interior, *North American Waterfowl Management Plan* 11 (1986) (*Waterfowl Plan*).

their ecological importance and the likely impacts of the proposed activity.

Petitioner asserts two distinct challenges to the Corps' application of Section 328.3(a) to the development proposal at issue. First, petitioner contends that as a matter of statutory interpretation, the Corps' regulatory authority under the CWA is limited to waters that are either (1) usable for navigation in their current state or through reasonable improvement, or (2) connected through surface waters to waters that are navigable under the traditional conception of that term. Second, petitioner argues that as a matter of constitutional law, the use of waters as habitat by migratory birds provides a constitutionally insufficient basis for federal protection of those waters pursuant to the Commerce Clause. For the reasons that follow, those arguments lack merit.

I. THE CORPS HAS REASONABLY CONSTRUED THE TERM "WATERS OF THE UNITED STATES" TO INCLUDE WATERS WHOSE DEGRADATION OR DESTRUCTION COULD AFFECT INTERSTATE COMMERCE, EVEN WHERE THOSE WATERS ARE NOT NAVIGABLE IN FACT AND HAVE NO SURFACE CONNECTION TO WATERS THAT ARE NAVIGABLE IN FACT

The CWA was enacted in 1972 and substantially amended in 1977. As we explain below, the text and history of the 1972 Act reflected a congressional intent to expand the Act's coverage beyond the scope of prior water pollution laws—an expansion that suggested, but perhaps did not compel, the conclusion that the term "waters of the United States" encompasses isolated waters whose degradation or destruction could affect interstate commerce. See pp. 2-3 and note 1, *supra* (describing early discrepancy in approach between the

Corps and EPA). By 1977, however, the Corps had promulgated regulations that comprehensively construed the CWA to cover isolated waters, and Congress in 1977 engaged in prolonged debate regarding the propriety of that construction. In the end, Congress acquiesced in the Corps' (and EPA's) construction of the disputed statutory language, both by rejecting legislative proposals that would have narrowed the Corps' jurisdiction, and by amending the Act in a manner that presupposed the correctness of the Corps' approach.

A. The Text Of The CWA Makes Clear That The Act's Coverage Is Not Limited By Traditional Conceptions Of Navigability

1. The CWA proscribes the discharge of any "pollutant" into "navigable waters" except in accordance with the Act. See 33 U.S.C. 1311(a), 1362(12)(A). Standing alone, Congress's use of the phrase "navigable waters"—an existing term of art with an established legal meaning—might have suggested an intent to confine the Act's coverage to waters suitable for commercial traffic either in their natural state or with reasonable improvements. See, *e.g.*, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 406-408, 416-417 (1940). Other provisions of the original CWA, however, indicated that the coverage of the Act was not so limited.

Most obviously, the term "navigable waters" was defined to include "the waters of the United States," 33 U.S.C. 1362(7)—a term of evident breadth, and one with no previously established legal meaning.[11] As the Court observed in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121,

[11] Although petitioner suggests (see Br. 16, 18) that the term "waters of the United States" has an established legal meaning, the cases on which it relies all employed the term "*navigable* waters of the United States." Petitioner identifies no authority suggesting that the term "waters of the United States," standing alone, has traditionally implied any requirement of suitability for use by commercial traffic.

133 (1985), "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 705 (1995) ("An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.").[12]

Other features of the CWA in its original form reinforced the conclusion that the Act was not limited to water bodies meeting traditional tests of navigability. *Inter alia*, the Act expresses Congress's objective of attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). The Act also directs the Corps in evaluating permit applications to consider guidelines developed by EPA in conjunction with the Corps, see 33 U.S.C. 1344(b); and EPA in formulating those

[12] In *Sweet Home*, the Court considered Section 9(a)(1)(B) of the Endangered Species Act (ESA) of 1973, 16 U.S.C. 1531 *et seq.*, which makes it unlawful to "take" any endangered or threatened species. 515 U.S. at 691 (quoting 16 U.S.C. 1538(a)(1)(B)). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Ibid.* (quoting 16 U.S.C. 1532(19)). The Court rejected the contention that construction of the word "take" should be guided by the term's common-law meaning. *Id.* at 697 n.10. It explained that "Congress explicitly defined the operative term 'take' in the ESA, * * * thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term 'harm.'" *Ibid.* The Court sustained as reasonable an Interior Department regulation that defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* at 691; see *id.* at 696-708. Similarly here, the judicial inquiry appropriately focuses on whether the contested Corps regulation reflects a permissible construction of the phrase "waters of the United States"—not whether the regulation accords with prior understandings of a term ("navigable waters") that Congress has expressly defined for purposes of the CWA.

guidelines must take into account the effect of discharges on "fish, shellfish, [and] wildlife," 33 U.S.C. 1343(c)(1)(A), "changes in marine ecosystem diversity, productivity, and stability," 33 U.S.C. 1343(c)(1)(B), and "esthetic, recreation, and economic values," 33 U.S.C. 1343(c)(1)(C). See *Riverside Bayview*, 474 U.S. at 132 (characterizing the CWA's purpose as the "[p]rotection of aquatic ecosystems"). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c). Because the potential for pollutant discharges to impair those values does not depend on the suitability of a water body for commercial traffic, the range of congressional objectives set forth in the text of the original Act strongly suggested that the CWA's coverage is not confined by traditional concepts of navigability.[13]

2. The clearest textual indication of the Act's expansive scope, however, was added to the CWA in 1977. Section 404(g)(1) of the Act (91 Stat. 1601) as amended provides in pertinent part:

> (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into *the navigable waters (other than those waters which are presently*

[13] "*In the absence of contrary indication*, [the Court] assume[s] that when a statute uses [an existing term of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (emphasis added); see Pet. Br. 16. As the italicized language makes clear, that principle of interpretation is a guide to congressional intent, not an inflexible rule of construction. "This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose." *Taylor* v. *United States*, 495 U.S. 575, 594-595 (1990); see *id.* at 595-596 (citing cases).

> *used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto)* within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

33 U.S.C. 1344(g)(1) (emphasis added). If the EPA Administrator approves a proposed state program, the Corps is divested of jurisdiction over "activities with respect to which a permit may be issued pursuant to such State program." 33 U.S.C. 1344(h)(2)(A). That provision would be meaningless if the waters subject to the Corps' Section 404 jurisdiction included no waters "other than" those that meet traditional standards of navigability.[14]

B. The Legislative History Of The 1972 Act And The 1977 Amendments Supports The Corps' Construction Of The Term "Waters Of The United States"

1. Bills introduced in 1972 in both the House of Representatives and the Senate defined "navigable waters" as "the navigable waters of the United States." See 2 Environmental Policy Div., Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of*

[14] Additionally, Section 404(g)(2) and (3) (91 Stat. 1601), as added in 1977, provide that "the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service," shall be given notice of and an opportunity to comment on a proposed state permit program. 33 U.S.C. 1344(g)(2) and (3). That requirement assumes that protection of fish and wildlife is one of the goals of the Section 404 program. The legislative history confirms that view. See S. Rep. No. 370, 95th Cong., 1st Sess. 78 (1977) ("The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act.").

1972 at 1069, 1698 (1973). The House and Senate Committees, however, expressed concern that the definition might be given an unduly narrow reading. Thus, the House Report observed:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972). The Senate Report stated that "[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971). The Conference Committee deleted the word "navigable" from the definition of "navigable waters," broadly defining the term to include "the waters of the United States." The Conference Report explained that the definition was intended to repudiate earlier limits on the reach of federal water pollution efforts: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Those passages strongly suggest that the coverage of the Act does not

depend upon the suitability of particular waters for commercial traffic.[15]

As petitioner notes (Br. 22-23), individual supporters of the CWA occasionally described the proposed Act's coverage in terms of actual suitability for commercial transportation. Senator Muskie placed before the Senate an exhibit stating that the CWA would protect all waters that "form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today." 118 Cong. Rec. 33,699 (1972). Representative Dingell stated that "[t]he gist of the Federal test is the waterway's use as a highway, not whether it is part of a navigable interstate or international commercial highway." *Id.* at 33,757 (citations and internal quotation marks omitted). Representative Dingell also stated, however, that the term "navigable waters" as used in the CWA "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." *Id.* at 33,756. He asserted as well that

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[15] This Court has recognized that the CWA was "not merely another law 'touching interstate waters'" but was "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *City of Milwaukee* v. *Illinois*, 451 U.S. at 317; see also *id.* at 318 ("Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation."); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (existing statutory scheme "was completely revised" by enactment of the CWA). Thus, even prior to the 1977 amendments, Congress's evident intent to effect a comprehensive overhaul of the existing statutory scheme casts serious doubt on petitioner's contention (Br. 15-16) that the CWA's geographic coverage should be construed by reference to prior water protection laws.

"this new definition clearly encompasses all water bodies." *Id.* at 33,757. Thus, while the remarks of individual legislators may create a degree of ambiguity on this point (by negative implication, rather than contradiction), the 1972 legislative history taken as a whole indicates that Congress did not intend to restrict the Act's coverage to waters that satisfy traditional standards of navigability.

2. During the debates on the 1977 CWA amendments, the scope of the "navigable waters" subject to the Act—and, in particular, the propriety of the Corps' assertion of jurisdiction over "isolated" waters—was a principal subject of congressional concern. The Corps' interim final regulations, published in 1975, expressed the agency's intent to assert jurisdiction (in Phase III of the phased-in approach) over waters not adjacent to traditional navigable waters. See 40 Fed. Reg. 31,321, 31,324-31,325 (1975); 33 C.F.R. 209.120(d)(2)(i) (1976).[16] A bill passed by the House of Representatives provided that for purposes of Section 404, the term "navigable waters" would be defined to mean "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 123 Cong. Rec. 10,420 (1977); see *id.* at 10,434 (passage of bill). The bill would have restricted the Corps' regulatory authority under Section 404 to "navigable waters" so defined and their "adjacent wetlands." *Id.* at 10,420.

Critics of the Corps' regulatory program pointed to the regulation of "isolated" waters as a reason to diminish the

[16] The final regulations, published in July 1977 during the pendency of the congressional debates (*i.e.*, after passage of the initial House bill but before debate in the Senate), defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,144 (1977); 33 C.F.R. 323.2(a)(5) (1978).

Corps' authority. Representative McKay stated that "[a]s it now stands, the corps has effective authority to require a permit application every time a dredge or fill activity is planned for any stream, ditch, or pond in the United States." 123 Cong. Rec. 10,418 (1977). Representative Abdnor similarly understood that under the existing regulations, "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." *Id.* at 34,852 (extension of remarks). He caused to be reprinted in the Congressional Record a letter from a Corps official explaining that "the ultimate test of these [regulatory] limits is a determination that an activity affects interstate commerce in connection with a given water." *Ibid.*; see also *id.* at 10,431 (remarks of Rep. Wright).

Unlike the House bill, the bill reported by the Senate Committee on Environment and Public Works did not restrict the geographic scope of the Corps' Section 404 jurisdiction. As the Senate Report explained:

> To limit the jurisdiction of the [CWA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.
>
> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.

S. Rep. No. 370, *supra*, at 75. That passage demonstrates the Committee's understanding of the Corps' phased-in expansion of Section 404 jurisdiction in the 1975 regulations, which included tributaries of navigable waters in Phase II and "isolated" waters in Phase III. Instead of rejecting that approach, the Committee incorporated the existing regulatory scheme into an amendment authorizing partial administration of the Section 404 program by the States. The Senate bill also responded to the problem of perceived over-regulation by exempting specified activities—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See *id.* at 75-77.

As in the House of Representatives, debate on the bill reported by the Senate Committee reflected an understanding that the Corps had asserted regulatory jurisdiction over "isolated" waters. Senator Bentsen asserted that the Committee bill "skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 Cong. Rec. 26,711 (1977). He proposed an amendment that would have restricted the geographic scope of the Corps' authority in the same manner as the House bill—*i.e.*, to navigable waters traditionally defined and their adjacent wetlands. See *id.* at 26,710-26,711. Senator Tower supported the Bentsen amendment as a means of addressing "a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722. On the other hand, Senator Stafford argued that it was unnecessary to narrow the definition of "waters" because the Senate bill "insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the corps program in the so-called 'Phase I waters.'" *Id.* at 26,714.

The Bentsen amendment was rejected by the full Senate. 123 Cong. Rec. 26,728 (1977). The Conference Committee adopted the Senate approach, and "efforts to narrow the definition of 'waters' were abandoned." *Riverside Bayview*, 474 U.S. at 137. Congress instead acted to protect the prerogatives of the States by enacting 33 U.S.C. 1344(g), which established a mechanism by which the States may assert ultimate administrative control over the regulation of Phase II and III waters. See S. Conf. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977); pp. 20-21, supra.[17] As Senator Baker explained:

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent. A permit program will continue to regulate dredged or fill material discharged into all our Nation's waters.

123 Cong. Rec. 39,209 (1977); see also *id.* at 39,196 (Sen. Randolph) (1977 legislation in its final form "recognizes that there must be no basic gaps in the program for protection of wetlands and waterways from contamination"); *id.* at 39,210 (Sen. Wallop) (explaining that "the conferees did not retreat from [Section 404's] broad jurisdiction" but instead sought to alleviate over-regulation by, *inter alia*, "provid[ing] for the delegation of the permit program to the States" and "preempt[ing] many activities from permit requirements").

The 1977 legislative history thus makes three points clear. *First*, Congress was well aware of the Corps' existing regulatory approach—including the Corps' inclusion of "isolated" waters within the regulatory definition of "waters of the United States"—and debate in both Houses focused on

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[17] The 1977 amendments also limited the scope of the Corps' regulatory jurisdiction by exempting specified activities from the Section 404 program. 33 U.S.C. 1344(f); see S. Conf. Rep. No. 830, *supra*, at 100-101.

the propriety of that enforcement scheme. *Second*, a proposed statutory amendment that would have limited the "waters of the United States" to traditional navigable waters and their adjacent wetlands was passed by the House of Representatives and introduced in the Senate, but Congress ultimately declined to enact it. *Third*, Congress's acquiescence in the existing regulatory definition was manifested not only by its failure to pass legislation superseding that definition, but also by its enactment of 33 U.S.C. 1344(g), which presumed that the Corps' Section 404 jurisdiction encompassed waters "other than" navigable-in-fact waters and their adjacent wetlands. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983) (inferring congressional acquiescence in agency interpretation from enactment of subsequent law that presumed the correctness of the agency's view); *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1313 (2000) (same). Congress's refusal to overrule the Corps' construction of the CWA as extending to "isolated" waters, together with its enactment of a new statutory provision that presumed the legitimacy of the existing regulatory definition, shows the reasonableness of the Corps' approach.

C. The Corps' Construction Of The Statutory Term "Waters Of The United States" Is Entitled To Deference

1. "Th[e] view of the agency charged with administering the statute is entitled to considerable deference," *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985), and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984). The term "waters of the United States" is neither an established term of art (see p. 18 and note 10, *supra*) nor one with an obvious "plain meaning." The choice among reasonable alternative constructions is therefore the

province of EPA and the Corps, the executive agencies charged with the Act's administration.[18]

In *Riverside Bayview*, this Court held that in light of the well-established rule of deference to administrative judgments, judicial "review [wa]s limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U.S. at 131.[19] The Court observed that "[f]aced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority." *Id.* at 132. While recognizing that "[n]either of these sources provides unambiguous guidance for the Corps in this case," the Court concluded that "together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as 'waters' within the meaning of § 404(a)." *Ibid.*[20]

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[18] As we explain above (see pp. 2-5, supra), although the Corps and EPA initially disagreed regarding the proper construction of the term "waters of the United States," the two agencies have since promulgated substantially identical regulatory definitions. Compare 33 C.F.R. 328.3(a)(3) with 40 C.F.R. 230.3(s)(3) and 232.2. EPA's consistent view as to the broad scope of regulatory jurisdiction conferred by the CWA supports the Corps' position. See note 1, *supra* (noting the primary role of EPA in the administration of the Act). Indeed, the interpretations of the two agencies coalesce for purposes of deference in this case.

[19] Petitioner's suggestion (Br. 33 n.13) that deference is inappropriate in this case because the question presented goes to the scope of the Corps' regulatory jurisdiction is directly contrary to *Riverside Bayview*. See also *CFTC* v. *Schor*, 478 U.S. 833, 845 (1986) (holding deference appropriate notwithstanding "statutory interpretation-jurisdictional" nature of issue).

[20] The Court reached that conclusion, moreover, despite its recognition that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" 474 U.S. at 132. The Court explained that "the evident breadth of congressional concern for pro-

2. Petitioner contends (Br. 32) that "[t]he CWA's jurisdictional terms * * * are *not* ambiguous when read in light of settled meanings established in this Court's decisions." Reliance on the "settled meaning[]" of the term "navigable waters" is flatly inconsistent, however, with 33 U.S.C. 1344(g)(1), which assumes that federal jurisdiction exists over waters "other than" those actually or potentially suitable for commercial traffic. See pp. 20-21, *supra*. Petitioner's plain language argument is also at odds with *Riverside Bayview*, which sustained the Corps' assertion of jurisdiction over adjacent wetlands, notwithstanding the Court's recognition that such areas are neither "navigable" nor "waters" under usual understandings of those terms. See 474 U.S. at 132-133.[21]

Elsewhere, petitioner appears to acknowledge (Br. 16-17) that the Corps' jurisdiction extends to waters (including

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tection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133. In the instant case, by contrast, there is no dispute that the ponds on petitioner's land are "waters" within the usual understanding of that term.

[21] *Riverside Bayview* is also highly instructive with respect to several subsidiary questions implicated here. The Court in *Riverside Bayview* held that the Corps' construction of the term "waters of the United States" is entitled to deference, 474 U.S. at 131; that "the term 'navigable' as used in the Act is of limited import," *id.* at 133; that the potential applicability of the Corps' rule to some waters lacking ecological significance is unproblematic because the Corps can grant a permit in such cases, *id.* at 135 n.9; that the history of the 1977 amendments is relevant in construing the term "waters of the United States" because "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it," *id.* at 137; and that the language of 33 U.S.C. 1344(g)(1) bears on the proper interpretation of the term "waters of the United States" because the two provisions should be construed *in pari materia*, 474 U.S. at 138 & n.11.

wetlands) that are not themselves actually or potentially suitable for navigation, but that feed through surface connections to traditional navigable waters. On that theory, the term "waters of the United States" would encompass (a) traditional navigable waters, (b) tributaries of those waters, and (c) wetlands adjacent to waters in either of the first two categories. Petitioner contends (Br. 17) that such waters are different in kind from "isolated" waters, even those whose destruction or degradation can be expected to affect interstate commerce. But the basis for that distinction is unclear. The established meaning of the phrase "navigable waters" cannot provide the answer, since that term of art would exclude non-navigable tributaries and all wetlands. Nor does the "plain meaning" of the phrase "waters of the United States" compel the line of demarcation that petitioner advocates.

Thus, "Congress has not directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843. Faced with that textual ambiguity, the Corps and EPA have devised a jurisdictional standard that turns on the prospect of interstate effects resulting from water pollution, rather than on a particular causal mechanism (surface water connections to traditional navigable waters) by which those effects may be produced. That approach is entirely reasonable, since pollution of even "isolated" waters can impair the interests that the CWA was intended and declared by Congress to protect. See pp. 19-20, *supra*.[22] The propriety of the

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[22] Petitioner's only basis for distinguishing between a non-navigable tributary and a non-navigable pond is that pollution of the tributary may ultimately degrade the quality of traditional navigable waters. See Pet. Br. 16-17. That argument assumes that Congress's only *objective* in the CWA was to protect the quality of traditional navigable waters. Under that theory, protection of non-navigable tributaries and adjacent wetlands is not an end in itself, but simply the fortuitous result of Congress's effort to protect a much narrower category of waters. The breadth of the Act's declared purposes, however—which include protection and propagation of

agencies' regulatory definition is further supported by the steps that Congress took (and declined to take) in 1977 after the Corps' approach was brought to its attention. See pp. 24-28, *supra*; *Riverside Bayview*, 474 U.S. at 137.

3. Petitioner errs in contending (Br. 33) that "[t]he Corps' claim to deference raises serious problems of delegation of lawmaking authority." This Court has long recognized that Congress in exercising its Commerce Clause authority may "le[ave] it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have" the requisite effect on commerce. *United States* v. *Darby*, 312 U.S. 100, 120 (1941).[23] Nor is there merit to petitioner's contention (Br. 33) that "Congress focused on human navigation, not the episodic migration of waterfowl." To the contrary, the "Congressional declaration of goals and policy" (33 U.S.C. 1251) that begins the CWA includes "the protection and propagation of fish, shellfish, and wildlife," 33 U.S.C. 1251(a)(2),[24] but makes no reference to the furtherance of

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fish and wildlife, see 33 U.S.C. 1251(a)(2)—strongly suggests that Congress regarded protection of such waters as independently desirable. In any event, degradation of "isolated" waters may also impair the quality of traditional navigable waters. See note 10, *supra*.

[23] For essentially the same reason, there is no merit to petitioner's reliance (Br. 26-28) on the canon that ambiguous statutes will be construed to avoid constitutional difficulties. The Corps has construed the term "waters of the United States" to encompass all waters physically located within this country (including the territorial seas) that bear a sufficient nexus to interstate commerce to support the exercise of federal regulatory jurisdiction. Since the Corps has defined the scope of its authority by reference to constitutional limits on federal power, the pertinent regulation (33 C.F.R. 328.3(a)(3)) cannot be subject to facial constitutional attack.

[24] Petitioner errs in asserting (Br. 24) that "[n]o one in 1977 so much as mentioned migratory birds as a basis for Corps jurisdiction." The 1977 legislative history includes repeated references to the need for comprehensive protection of the country's wetlands and other waters as habitat for birds and other wildlife. See S. Rep. No. 370, *supra*, at 10 (waters

navigation or to the prevention of impediments to commercial traffic. Compare Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. 403 ("The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited.").

4. Finally, the Corps' exercise of regulatory jurisdiction over isolated waters does not (as petitioner contends, see Br. 28-31) threaten the federal-state balance. The Corps in evaluating permit applications recognizes that "[t]he primary responsibility for determining zoning and land use matters rests with state, local and tribal governments," and the agency "will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance." 33 C.F.R. 320.4(j)(2). Such issues of national significance include "preservation of special aquatic areas, including wetlands, with significant interstate importance." *Ibid.* Of course, the regulatory scheme contemplates that projects approved by state and local authorities may be denied a federal permit if they threaten significant national interests. But it is neither unusual nor inappropriate for a federal agency's exercise of its authority to have some preemptive effects. See, *e.g.*, *City*

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covered by Section 404 "provide nesting areas for a myriad of species of birds and wildlife"); 123 Cong. Rec. 10,415 (1977) (Rep. Lehman) (Section 404 as interpreted in the Corps' regulations "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits"); *id.* at 26,697 (Sen. Muskie) (Section 404 is necessary to protect wetlands because, *inter alia*, they "provide nesting areas for a myriad of species of birds and wildlife"); *id.* at 26,701 (Sen. Stafford) (Section 404 is "essential to the preservation of migratory and resident fish, bird and other animal populations"); *id.* at 26,716 (Sen. Chafee) ("wetlands provide the breeding and feeding areas for our migratory waterfowl"); *id.* at 26,719 (Sen. Baker) (wetlands important as, *inter alia*, "essential nesting and wintering areas for waterfowl"). Cf. note 14, *supra*.

of N.Y. v. *FCC*, 486 U.S. 57, 63-64 (1988). And a decision to deny a permit is, of course, subject to judicial review.[25]

Far from preserving the existing balance between federal and state authority, petitioner's construction of the Act would substantially alter the manner in which water pollution is currently addressed. The Corps' "other waters" regulation has been in effect for more than 20 years. Congress considered but declined to enact legislation that would have superseded that rule (see pp. 24-28, *supra*), and this Court has recognized that "the Act applies to virtually all surface water in the country." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987); see *id.* at 486 n.6 ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."); *id.* at 492 ("The Act applies to all point sources and virtually all bodies of water."). The courts of appeals have uniformly agreed, moreover, that Congress intended the geographic scope of the CWA to extend to the maximum extent permissible

[25] As we explain above (see pp. 20-21, *supra*), moreover, the CWA provides a mechanism by which state authorities may assume responsibility for the protection of waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto." 33 U.S.C. 1344(g)(1). If officials in a particular State regard the Corps' exercise of jurisdiction over isolated waters as an intrusion on state prerogatives, the Act provides a means of adjusting the division of regulatory responsibilities between federal and state authorities. See note 7, *supra*. Additional protection of state interests is provided by 33 C.F.R. 323.2(h)(2), which authorizes the Corps to issue a general permit for a category of activities when "[t]he general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal."

under the Commerce Clause.[26] Although the Act explicitly preserves the States' authority to regulate pollutant discharges within their borders, see 33 U.S.C. 1370, and indeed authorizes the States to assume responsibility for administering the Section 404 program with respect to Phase II and III waters, see 33 U.S.C. 1344(g), the States in fashioning their own regulatory schemes have acted against a background assumption of comprehensive federal oversight. Judicial invalidation of the "other waters" regulation at this late date can therefore scarcely be regarded as a means of preserving the federal-state balance.[27]

[26] See, *e.g.*, *United States* v. *Hartsell*, 127 F.3d 343, 348 & n.1 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Tull*, 769 F.2d 182, 184 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); see also *United States* v. *Eidson*, 108 F.3d 1336, 1341 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997); *United States* v. *Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 357 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); *Quivira Mining Co.* v. *United States EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-915 (5th Cir. 1983). But cf. *Exxon Corp.* v. *Train*, 554 F.2d 1310, 1317-1331 (5th Cir. 1977) ("waters of the United States" does not cover groundwater).

[27] Indeed, petitioner's interpretation of the CWA would constrain federal regulatory authority more greatly than the rejected 1977 House bill and parallel Bentsen amendment would have done. Those legislative proposals would have narrowed the definition of navigable waters only with respect to the Corps' permitting authority over discharges of dredged and fill material under Section 404. "[T]he House bill would have left intact the existing definition of 'navigable waters' for purposes of § 301 of the Act, which generally prohibits discharges of pollutants into navigable waters." *Riverside Bayview*, 474 U.S. at 137-138. Senator Bentsen emphasized that "our amendment deals with section 404 * * * which regulates dredging and filling activities * * *. Section 404 does not speak to toxic discharges, * * * and we do not propose to change the law and permit any relaxation of our efforts to clamp down on the dumping of sewage or 'toxic spoil' or any other toxic discharges in even the smallest creek in this Nation." 123 Cong. Rec. 26,712 (1977). Petitioner's

II. USE OF PETITIONER'S WATERS BY MIGRATORY BIRDS FOR HABITAT PROVIDES A CONSTITUTIONALLY SUFFICIENT BASIS FOR FEDERAL REGULATION UNDER THE COMMERCE CLAUSE

This Court has identified "three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) intrastate activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558-559 (citing, *inter alia*, *Perez* v. *United States*, 402 U.S. 146, 150 (1971)). Under *Lopez*'s third category, Congress may regulate intrastate activities that do not individually have a pronounced effect on interstate commerce if the aggregate effect of the class of activities is substantial.[28] Thus, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court upheld the application of the Agricultural Adjustment Act of 1938 to the production of wheat consumed by the grower. That one such person's production of

construction of the CWA, by contrast, would threaten to deprive EPA of jurisdiction under Section 402 of the Act to regulate discharges of toxic chemicals into isolated waters, since EPA's jurisdiction is likewise confined to "waters of the United States." See 33 U.S.C. 1311(a), 1342, 1362(7), 1362(12). In addition, the 1977 House bill and Bentsen amendment would have authorized the Corps to regulate "the discharge of dredged or fill material in waters other than navigable waters and in wetlands other than adjacent wetlands" pursuant to an agreement with the Governor of the relevant State. 123 Cong. Rec. 10,421 (1977); *id.* at 26,710; see H.R. Rep. No. 139, 95th Cong., 1st Sess. 23 (1977).

[28] This Court has applied such an aggregation approach in, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 324-325 (1981); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Perez* v. *United States*, 402 U.S. at 154; *Katzenbach* v. *McClung*, 379 U.S. 294, 301 (1964); *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944); *Wickard* v. *Filburn*, 317 U.S. 111, 127-129 (1942); *United States* v. *Darby*, 312 U.S. at 123.

wheat may have had trivial effects upon commerce was of no import, the Court held, "where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128.

This Court has made clear, however, that the Commerce Clause does not grant Congress plenary authority to regulate intrastate conduct based on its likely effects on the national economy. See *Lopez*, *supra*; *United States* v. *Morrison*, 120 S. Ct. 1740 (2000). In articulating the limits on the third category of permissible Commerce Clause regulation, the Court has attached substantial importance to whether the regulated activity is of a commercial character. See *Morrison*, 120 S. Ct. at 1749-1750. The Court has also emphasized that limits on Commerce Clause authority serve ultimately to ensure that Congress does not assume a general police power or usurp functions more appropriately exercised by the States. *Id.* at 1752-1754.

The Corps' exercise of regulatory authority in this case falls well within constitutional limits. Because migratory birds are a shared resource of the several States, their protection has traditionally been regarded as a task most appropriately performed by the national government. The activities for which petitioner sought a Section 404 permit are of a commercial character, and the waters involved were determined, after extensive analysis, to furnish important habitat for numerous migratory bird species. Finally, the destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce.[29]

[29] In *Sweet Home* this Court sustained, against a statutory challenge, an Interior Department regulation that construed the Endangered Species Act of 1973 (ESA) to prohibit habitat modification on private land that would kill or injure members of a listed species. See note 12, *supra*. No Member of the Court suggested that the ESA, so construed, might exceed Congress's powers under the Commerce Clause. The Fourth Circuit recently held that restrictions on takings of endangered red wolves

A. The Protection Of Migratory Bird Habitat Furthers A Governmental And Public Interest That Has Long Been Recognized To Be A Matter Of National Concern

1. In *Lopez* and *Morrison*, this Court emphasized that while congressional power under the Commerce Clause is broad, it is subject to judicially enforceable limits. The Court stressed that "[t]he Constitution requires a distinction between what is truly national and what is truly local," *Morrison*, 120 S. Ct. at 1754, and it expressed "the concern * * * that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," *id.* at 1752. The federal laws struck down in those cases were intended to further governmental interests—protection of the educational process, see *Lopez*, 514 U.S. at 564-566, and the "suppression of violent crime," see *Morrison*, 120 Ct. at 1754—that have as an historical matter been principally entrusted to the States. That the evils addressed by those laws might also have ultimate effects on the national economy was not, the Court

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imposed by the ESA and implementing regulations are a permissible exercise of Commerce Clause authority. See *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (Wilkinson, C.J.). The court observed that the regulated activity is properly regarded as economic in nature because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves," *id.* at 492, even though the statute and rules do not require proof of an economic motive in a particular case. The court also stated that "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." *Ibid.* The court of appeals rejected the plaintiffs' contention that the ESA and regulations were inconsistent with "the historic roles of federal and state authority," *id.* at 499, explaining that "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation. The federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* at 500.

held, a sufficient basis for federal regulation under the Commerce Clause.

By contrast, "[t]he protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'" *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920) (Holmes, J.)). The Court in *Holland* explained that the protection of migratory birds is an interest inherently unsuited to effective vindication by the States:

> [Migratory birds] can be protected only by national action in concert with that of another power.[30] *The subject matter is only transitorily within the State and has no permanent habitat therein.* But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food

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[30] *Missouri* v. *Holland* upheld the Migratory Bird Treaty Act, a federal law enacted pursuant to the treaty power as a means of implementing an agreement between the United States and Great Britain for the protection of birds that migrated between the United States and Canada. See 252 U.S. at 431-433. The Court observed that

> [a]n earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States* v. *Shauver*, 214 Fed. 154. *United States* v. *McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer* v. *Connecticut*, 161 U.S. 519, this control was one that Congress had no power to displace.

Id. at 432. The Court concluded that "[w]hether the two cases cited [*i.e.*, *Shauver* and *McCullagh*] were decided rightly or not they cannot be accepted as a test of the treaty power." *Id.* at 433. In *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 283-285 (1977), the Court held that a State's purported "ownership" of wildlife within its borders did not provide a basis on which the State could prohibit federally licensed vessels from fishing in the State's waters. Two Terms later *Geer* was overruled. See *Hughes* v. *Oklahoma*, 441 U.S. 322, 335-336 (1979).

> supply is cut off and the protectors of our forests and our crops are destroyed. *It is not sufficient to rely upon the States.*

Holland, 252 U.S. at 435 (emphasis added). Thus, activities that threaten the well-being of migratory birds—like activities that pollute interstate waters—are a traditional and appropriate subject of federal regulation. Like water flowing in an interstate river, migratory birds constitute a natural resource of substantial economic importance that has no permanent locus in a single State. Because "the subject matter is only transitorily within the State" where the regulated activity occurs, the birds are appropriately regarded as a shared resource of the several States. The appropriate balance between species protection and other goals therefore should not be entrusted to the sole judgment of state authorities.

2. The protection of suitable habitat is an integral feature of federal efforts to protect the well-being of migratory birds. See *North Dakota*, 460 U.S. at 309-310 ("A series of treaties dating back to 1916 obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats."); compare *Sweet Home*, 515 U.S. at 699-700 (recognizing that loss of habitat for endangered species could cause their extinction). More than 50% of aquatic migratory bird habitat has been lost since the Nation's founding. Thomas Dahl, U.S. Dep't of the Interior, *Wetlands Losses in the United States 1780's to 1980's* at 1 (1990). That loss has greatly reduced the population of migratory birds. See *Waterfowl Plan* 9; *Hoffman Homes, Inc.* v. *Administrator, United States Envtl. Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) (noting that the "cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986

(D.C. Cir. 1975) ("Research and experience have demonstrated that habitat is the key factor limiting most, if not all, migratory bird populations.") (citation omitted).[31] "Isolated" waters play a crucial role as habitat for numerous aquatic species, including migratory waterfowl and other migratory birds.[32]

3. For the reasons stated above, recognition of federal power to prevent the destruction of migratory bird habitat presents no danger that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 120 S. Ct. at 1752. In recognizing the "national interest" in the protection of migratory birds, the Court in *Missouri* v. *Holland* did not simply recite the obvious fact that migratory birds are

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[31] Wetlands "provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of * * * migratory birds." Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901(a)(2). See also Water Bank Act, 16 U.S.C. 1301 (declaring it to be "in the public interest to preserve, restore, and improve the wetlands of the Nation * * * to preserve and improve habitat for migratory waterfowl."). The North American Waterfowl Management Plan, signed by the United States, Mexico, and Canada, as part of the implementation of the Migratory Bird Treaty Act, recognizes the crucial importance of protecting migratory bird habitats, including ponds and wetlands. *Waterfowl Plan* 1, 9-11. Wetlands provide essential breeding and resting sites for more than 50% of the Nation's migratory bird species. Dahl & Johnson, *supra*, at 3.

[32] See National Research Council, *Wetlands: Characteristics and Boundaries* 9 (1995) ("isolated" wetlands "may even perform some unique or particularly valuable functions, including maintenance of water quality and the support of waterfowl."); *id.* at 156 ("Small, shallow wetlands that are isolated from rivers are frequently important to waterfowl."). Shallow "isolated" waters typically thaw early in the season, providing important habitat for migratory birds. *Ibid.* Prairie potholes—isolated, water-filled glacial depressions prevalent in the Plains States—provide substantial support of waterfowl and wading birds. *Ibid.* As much as half the waterfowl of North America originate from the pothole region. *Id.* at 280-281; see also *North Dakota*, 460 U.S. at 304 & n.4 (discussing importance of prairie potholes).

present throughout the country, or that the cumulative nationwide impact of migratory bird takings is substantial. Rather, the Court emphasized that the protection of migratory birds is principally entrusted to the national government because it is a task inherently unsuited to piecemeal accomplishment. The Corps' assertion of regulatory jurisdiction over "isolated" waters used as migratory bird habitat is thus fully in keeping with traditional conceptions of the "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754.[33]

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[33] Petitioner contends (Br. 34-36) that the Corps did not recognize until 1985 that the use of waters as habitat for migratory birds provided a basis for the exercise of federal regulatory jurisdiction. That is not the case. As early as 1975, when the Corps first announced its "phased in" approach (see p. 4 & note 2, *supra*), it stated that "[w]etlands considered to perform functions important to the public interest include * * * [w]etlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species." 40 Fed. Reg. 31,328 (1975). The issue in the 1985 oversight hearings on which petitioner relies (see Br. 35) was the *manner* in which the Corps had been exercising its jurisdiction—specifically, by requiring evidence of actual (and in some cases extensive) use by migratory birds. See *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 99th Cong., 1st Sess. 122-123 (1985) (*1985 Hearings*). Participants at the hearings recognized that in *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984), the Corps had successfully asserted jurisdiction over an intrastate lake based in part on its use by migratory birds. *1985 Hearings* 121, 208. The Acting Assistant Secretary of the Army for Civil Works assured the subcommittee that "[t]he Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations," and that a particularly controversial decision not to exercise jurisdiction over a pond in Texas was simply based on the fact that use by migratory birds in that instance was "trivial." *Id.* at 210-211; see also *id.* at 123. In any event, the Corps' assertion of regulatory jurisdiction over waters used by migratory birds as habitat is a valid exercise of Commerce Clause authority, regardless of when (or why) the Corps initially focused its attention on that category of waters.

B. The Instant Case Involves Commercial Activity Having A Substantial Impact On Actual Migratory Bird Habitat

1. The proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature. This Court has repeatedly held that state and local laws governing the construction and operation of landfills constitute regulations of commercial activity and are subject to scrutiny under the Commerce Clause. See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389-394 (1994); *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98-108 (1994); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-629 (1978). Just as "the rental of real estate * * * is unquestionably" a commercial use of property, *Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000), the dredge and fill activity at issue in this case amounts to commercial development.

As the case comes to this Court, it is undisputed that "the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a. The United States Fish and Wildlife Service (FWS) conducted an extensive analysis, see Fed. C.A. App. 190-198 (A.R. 16,382-16,390), and concluded that "[b]ecause of its value to migratory birds, we do not believe this site is an appropriate place to site a landfill." *Id.* at 197 (A.R. 16,389). As the Corps' decision documents make clear, the use of the ponds by migratory birds was not simply a jurisdictional trigger; rather, the potential impact of the proposed landfill on numerous bird species was a central justification for the denial of petitioner's permit application. See Fed. C.A. App. 32-40 (A.R. 15,692-15,700); pp. 8-9, *supra*. Although petitioner's district court complaint contested the merits of the Corps' permitting decision, see Pet. App. 1a-2a, that challenge was abandoned on appeal, see *id.* at 4a, and

the court of appeals accordingly "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

2. Notwithstanding the commercial character of petitioner's own proposed activities, and the undisputed impact of those activities on migratory birds, petitioner's argument focuses largely on hypothetical situations not before the Court. Thus, petitioner emphasizes (see Br. 37-38) that the Corps' Section 404 regulations would encompass some discharges of dredged and fill material undertaken for non-economic motives. Petitioner also asserts that since "migratory birds will alight almost anywhere," the effect of the Corps' regulatory approach is to assert federal jurisdiction over *all* isolated waters. Pet. Br. 42; see also *id.* at 40.

This Court's analysis of the constitutional question, however, should focus on the circumstances actually before the Court. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute). In part that is because "[t]his case involves an as-applied, not a facial challenge" (Pet. Br. 31 n.12) to a site-specific administrative decision. Perhaps the more fundamental point, however, is that (as we emphasize above) the Corps' determination that particular activities fall within its permitting authority does not mean that such activities are prohibited. It simply means that the Corps will scrutinize the likely impacts of a project on federal interests (including the protection of migratory birds) before deciding whether the project may go forward.[34]

[34] As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment —or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Justice O'Connor's concurring opinion in *Sweet Home* reflects a similar mode of analysis. In reviewing the Interior Department's regulatory definition of the ESA term "harm" (see note 12, *supra*), Justice O'Connor acknowledged that "[o]ne can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority." 515 U.S. at 714 (O'Connor, J., concurring). She agreed that the rule should be upheld, however, because she found it "clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications." *Ibid.*

There is also every reason to believe that the instant case is representative of those in which the use of waters as habitat for migratory birds is invoked as a basis for the Corps' denial of a Section 404 permit.[35] The loss of migratory

[35] The Corps has recognized that some features containing water are not ordinarily covered by the CWA, specifically citing artificial basins used for stock watering and irrigation, swimming pools, and temporary water-filled depressions created by construction projects. 51 Fed. Reg. 41,206, 41,217 (1986). Furthermore, the great majority of activities that do involve discharges of dredged or fill material into waters of the United States are currently authorized by general permits, issued on a nationwide or regional basis pursuant to 33 U.S.C. 1344(e). The Corps has informed us that in fiscal year 1999, it received approximately 60,000 applications for Section 404 permits, of which approximately 85% were considered under some type of general permit (either Nationwide or Regional General Permits). Many of the "trivial" examples cited by petitioners (Br. 37-38) are covered by nationwide permits. For example, NWP #18 authorizes discharges up to 0.1 acre in waters of the United States; NWP #29

bird habitat has been caused overwhelmingly by commercial activities—agricultural and industrial development, urbanization, and other commercial development.[36] See *Waterfowl Plan* 9; Dahl & Johnson, *supra*, at 2.[37] A judicial focus on the

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authorizes discharges up to 0.25 acre for construction and expansion of single-family homes, subject to certain conditions to ensure that the individual and cumulative environmental effects of such discharges are minimal. See 61 Fed. Reg. 65,874 (1996), modified at 65 Fed. Reg. 12,818 (2000). NWP #39 authorizes up to 0.5 acres of fill in isolated waters. 65 Fed. Reg. 12,818 (2000). Many of the activities authorized by general permits require no predischarge notification.

Even if it were otherwise appropriate for this Court to assess the propriety of the Corps' jurisdictional rule as applied to other hypothetical discharges, it is not clear how such analysis could workably be conducted. Whether the Corps' assertion of regulatory jurisdiction in hypothetical cases would violate the Constitution surely depends in part on (a) whether the landowner is ultimately allowed to carry out the proposed activity, and (b) whether the permitting process itself is unduly burdensome. Such questions can be answered only by examining the application of the regulatory scheme as a whole to the facts of an actual case. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).

[36] As the court of appeals explained, moreover,

> any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as [petitioner] suggests, but rather "the place where a plant or animal species naturally lives or grows." Webster's Third New International Dictionary 1017 (1993).

Pet. App. 7a-8a. In the instant case, both the Corps and the FWS emphasized the dependence of numerous bird populations on the waters that petitioner proposed to fill. See pp. 8-9, *supra*.

[37] While Section 404 permits may occasionally be required to undertake discharges not conducted as part of a commercial project—*e.g.*, a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor—such activities may be regarded as quasi-economic in essentially the same way as the homegrown wheat production and consumption that was at issue in *Wickard*. See *Lopez*, 514 U.S. at 560

facts before the Court is especially appropriate given the absence of any suggestion that this case involves an atypical application of the Corps' regulatory scheme.[38]

C. The Destruction Of Migratory Bird Habitat Has Substantial Effects On Interstate Commerce

The destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce. Migratory birds are the object of hunting activities that generate billions of dollars of commerce each year. In 1996, 3.1 million people hunted migratory birds and spent $1.3 billion doing so.[39] Fish and Wildlife Serv., U.S. Dep't of the Interior, & Bureau of the Census, U.S. Dep't of

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("Even *Wickard* * * * involved economic activity in a way that the possession of a gun in a school zone does not."). Such activities are likely to affect the value of the real estate and are essentially a mechanism by which the homeowner undertakes his own improvements in lieu of employing a commercial contractor. Compare *Wickard*, 317 U.S. at 128 (homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market") (quoted in *Lopez*, 514 U.S. at 560). In any event, the absence of a bright line between commercial and non-commercial dredge and fill activities simply reinforces the appropriateness of focusing on the facts of this case, rather than on hypothetical circumstances not before the Court.

[38] As petitioner observes (Br. 45-46), this Court in *Lopez* attached no constitutional significance to evidence indicating that the defendant himself had possessed a gun with the intent to sell it. In *Lopez*, however, there was no reason to believe that the arguably commercial character of the defendant's own conduct was in any way typical of Gun Free School Zones Act violations generally. Moreover, that commercial nexus was legally irrelevant to Lopez's guilt of the offense with which he was charged. By contrast, the Corps' decision whether to grant a Section 404 permit is based on consideration of a wide range of factors, including economic concerns. See 33 C.F.R. Pt. 320.

[39] Among the migratory bird species that were found to use petitioner's waters were mallards, wood ducks, and Canada geese, which are commonly associated with recreational hunting. Fed. C.A. App. 6-10 (A.R. 2464-2468).

Commerce, *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 25 (1997) (*1996 National Survey*); Pet. App. 7a. Ducks and geese, like those that use petitioners' ponds for habitat, are two of the most popular game birds, and were hunted by 2.5 million people in 1996. *1996 National Survey* 26; see also *Waterfowl Plan* 1 ("Waterfowl are the most prominent and economically important group of migratory birds in North America. * * * Waterfowl generate a direct expenditure in excess of several billions of dollars annually."). Migratory bird hunters spend $720 million per year on hunting equipment, and 11% of bird hunters cross state lines to hunt. *1996 National Survey* 25, 60.

Like bird hunting, bird watching annually generates several billion dollars of commerce. In 1996 some 62.9 million Americans spent $29 billion on wildlife-watching activities, including bird-watching. *1996 National Survey* 91. Almost $20 billion is spent each year on equipment for wildlife-watching. *Ibid.* Out of 17.7 million bird-watchers, 14.3 million people took trips specifically to observe, feed, or photograph waterfowl; 9.5 million took trips for other water-associated birds, such as herons. *Id.* at 45, 90. More than 6 million people crossed state lines in order to engage in birdwatching. *Id.* at 90.[40]

The court of appeals correctly held that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and

[40] The Court in *Missouri* v. *Holland* stated that it "s[aw] nothing in the Constitution that compels the Government to sit by while a food supply is cut off *and the protectors of our forests and our crops are destroyed*." 252 U.S. at 435 (emphasis added). The italicized language presumably refers to the fact that the birds eat insects that might otherwise destroy plant life. That link provides an additional way in which protection of migratory bird habitat ultimately furthers national economic interests.

breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires." Pet. App. 7a. Protection of national economic resources from the ill effects of local commercial activity is well within Congress's authority under the Commerce Clause, and the protection of migratory birds has long been regarded as a task primarily entrusted to national rather than state authorities. Petitioner's constitutional challenge to the Corps' assertion of regulatory jurisdiction in this case should therefore be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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By claiming to have jurisdiction over isolated, mainly seasonal ponds on SWANCC's land because migratory birds use them, the Corps obliterates the distinction between what is national and what is local. If federal authority reaches all water and wetlands used by Canada geese, mallard ducks, and other migratory birds (AR 15578), there is nothing to prevent the federal government from regulating every tree in which migratory birds roost and every lawn on which they feed. If migratory bird use supplies a sufficient connection to interstate commerce because duck hunters and bird watchers travel and spend money, then as amici California *et al.* concede (at 1), the federal government may regulate the eating of hamburgers because that adversely affects rainforests. On the Corps' theory of the commerce power, no non-commercial activity is beyond federal authority, for nothing is so far removed from interstate commerce that it cannot be linked to it in some fashion. Pet. Br. 43-44 & n.18. Its approach leaves the commerce power "without effective bounds" that are "essential to the maintenance of our constitutional system" of enumerated federal powers. *Morrison*, 120 S. Ct. at 1748; *Lopez*, 514 U.S. at 555.

Whether or not it is unconstitutional for an agency to seize on non-commercial migratory bird use as an excuse for imposing federal regulation under the Commerce Clause, at minimum it gives rise to "grave and doubtful constitutional questions." *Jones*, 120 S. Ct. at 1911. The Clean Water Act provides for jurisdiction over "navigable waters," defined as "waters of the United States." Nothing in that language, other provisions of the CWA, or legislative history shows a "clea[r] indication" or "unmistakable intention" to reach isolated ponds that are neither navigable nor connected to navigable waters, just because they are used by migratory birds. *DeBartolo*, 485 U.S. at 575; *Five Gambling Devices*, 346 U.S. at 450; see *infra*, pages 10-19. Migratory birds are among the beneficiaries of the CWA, but there is no plausible claim that they are a mandatory marker of the Act's jurisdictional reach. Though the Corps attempts to show that "waters of the United States" include more than "navigable waters," it does not come close to

showing that they include all "waters used by migratory birds." Because the migratory bird rule is constitutionally doubtful and not a construction mandated by the CWA, it cannot justify the Corps' exercise of jurisdiction over SWANCC's balefill project.

1. a. Recognizing that its bird rule is untenable under the "substantially affects" category of commerce power and the *DeBartolo* "constitutional doubt" principle, the Corps relegates its defense of the Seventh Circuit's reasoning to the last few pages of its brief. It now prefers a different theory—that "migratory birds are a shared resource of the several States" whose protection is "a task most appropriately performed by the national government." U.S. Br. 37; see *id.* at 38-42. The Corps thus invents a new, fourth prong of commerce power for any "matter of national concern." *Id.* at 38. This vague and sweeping formulation has *no* basis in this Court's precedents. *North Dakota* v. *United States* and *Missouri* v. *Holland*, on which the Corps relies, upheld statutes under the federal government's *spending and treaty powers*—and the Corps makes no claim that the migratory bird rule rests on either of those powers. *Holland*, in fact, refutes the Corps' theory: this Court expressly recognized that protection of migratory birds "may be [a] matte[r] of the sharpest exigency for the national well being that *an act of Congress could not deal with [under the Commerce Clause] but that a treaty followed by such act could*." 252 U.S. at 433.

The Corps' effort to carve out a novel Commerce Clause rule that permits it to regulate in the "national interest" any activity that affects migratory birds rests on its assertion that protecting migratory birds is "inherently unsuited to effective vindication by the States." U.S. Br. 39. That claim is both wrong and constitutionally irrelevant.

There is no "race-to-the-bottom" among States in the field of environmental regulation. As we have shown with regard to Illinois and Cook County (Pet. Br. 5-7), and as *amici* have

shown more generally,[1] States and localities have led the way in protecting wetlands—and presumably would have done still more had federal agencies not pushed them aside. Lax environmental laws might assist States in some arenas in which they compete with each other, but they are a detriment in others, such as attracting labor and non-industrial growth. Given the plethora of state environmental regulations *more* stringent than federal standards, it appears that any "race" is to the top, not the bottom. See Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1227-1229, 1233-1244 (1992); Adler, *The Green Aspects of* Printz: *The Revival of Federalism and its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 627-632 (1998).[2]

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[1] See Br. of Alabama, App.; Br. of Nationwide Public Projects Coalition 19-25; Br. of Nat'l Ass'n of Home Builders 22-23 & n.12; Br. of Nat'l Stone Ass'n 13-14 & n.10; see also Ass'n of State Wetland Mgrs., *State Wetland Regulation: Status of Programs and Emerging Trends* 20-23 (1995) (noting increasing sophistication and breadth of state regulatory programs, particularly those involving freshwater wetlands); *id.* at 37-170 (summarizing state programs).

[2] The Corps claims there has been a significant net loss of wetlands. U.S. Br. 40-41 & nn.31-32. This has not been true in recent times. See Br. of Chamber of Commerce 5 (citing government report that wetlands are created as fast as they are lost). Even if it were, it does not show *state* regulatory failure. The *Corps* destroys "more wetlands * * * than any other American developer." Grunwald, *Reluctant Regulator on Alaska's North Slope*, WASH. POST A1, A23 (Sept. 13, 2000). One recent Corps' proposal would drain 126,000 acres of wetlands—"six times more than the Corps permitted all the nation's private developers to touch last year"—for a project described by Interior Secretary Babbitt as "cockamamie" and "god-awful." Grunwald, *Working to Please Hill Commanders*, WASH. POST A1, A13-A14 (Sept. 11, 2000). Another current Corps development, described by a top EPA official as "[p]robably the dumbest project around," would drain 36,000 wetland acres. Grunwald, *An Agency of Unchecked Clout*, WASH. POST A1, A1 (Sept. 10, 2000).

Even if a "race-to-the-bottom" were a genuine fear, the Corps supplies no reason to distort the Commerce Clause and undermine the important federalism concerns it embodies when Congress has available (and has used) other, clearly constitutional ways to protect migratory birds and their habitat. These include direct protection of migratory birds under the treaty power and of habitat under the spending power (see *North Dakota*, 460 U.S. at 302-303 & n.2, 309-310; *Holland*, 252 U.S. at 431-432; Pet. Br. 49 (citing additional federal laws protecting birds, water, and wetlands)), and the power to prohibit harmful commercial activities under the Commerce Clause. See *Andrus* v. *Allard*, 444 U.S. at 54; Pet. Br. 39. And Congress also encourages States to work together to protect habitat. See CWA § 103, 33 U.S.C. § 1253. The Corps' claim that migratory birds will go undefended unless this Court restructures the commerce power is demonstrably false.

The Corps' bold but unexplained assertion (at 38-42) that it can regulate anything that has "nationwide impact" by claiming it is "inherently unsuited to effective vindication by the States" not only denigrates States' and municipalities' efforts to protect the environment and ignores Congress' vast powers in this area, but also flouts well-established constitutional principle. This Court has squarely rejected the argument that Congress—still less an agency acting by bureaucratic fiat—may regulate any area not subject to effective regulation by individual States, concluding that this assertion is in "direct conflict with the doctrine * * * of enumerated powers." *Kansas* v. *Colorado*, 206 U.S. 46, 89 (1907); see also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291 (1936) (rejecting proposition that "the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the States severally cannot deal or cannot adequately deal"); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 796 n.3 (3d ed. 2000) ("The fact that no one state may have effective power to deal with a problem does not of itself extend congressional power beyond that granted by the Constitution").

The question under the federalism "framework set forth in our Constitution * * * 'is not what power the Federal Government ought to have but what powers in fact have been given by the people.'" *New York* v. *United States*, 505 U.S. 144, 157 (1992); see *Kansas*, 206 U.S. at 90. Backstopping supposedly inadequate local regulation of anything in which there is a "national interest" is not one of those powers, as this Court reaffirmed last Term. The United States contended in *Morrison* that "pervasive failures" in state regulation justify the exercise of federal power to prevent violence against women (U.S. Br. in Nos. 99-5 and 99-29, at 20-21, 32, 35-36 (filed Nov. 12, 1999), and that the Commerce Clause permits federal regulation of matters that affect the national economy "that the States have been unable to deal with on their own." U.S. Reply Br. at 1, 10-12 (filed Dec. 30, 1999). This Court rejected the government's argument in *Morrison*, and should do so again here. Virtually anything could be said in the aggregate to affect the national interest and be especially amenable to a national solution, including violence against women and crime generally; the commerce power is not so broad.[3]

b. Ultimately, the government resorts to arguing that the application of the migratory bird rule was constitutionally justified *in this case* because "the filling of ponds in order to construct a municipal landfill" is "plainly of a commercial nature." U.S. Br. 43. This theory—raised here for the first time after seven years of Section 404 permit proceedings and six

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[3] The "Virginia Plan" *would* have given Congress power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20-21 (1966). The Framers *instead* chose a narrower scheme of specific, enumerated federal powers. See J. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 177-180 (1996); Nelson & Pushaw, *Rethinking the Commerce Clause*, 85 IOWA L. REV. 1, 25-26 n.104 (2000); *Carter Coal*, 298 U.S. at 292.

years of subsequent litigation—suffers from multiple flaws beyond the fact, explained in our opening brief, that SWANCC's municipal balefill for local municipal waste is not *interstate* commerce. Pet. Br. 45 n.19.

To begin with, the Solicitor General's new "as-applied" theory of jurisdiction is completely unrelated to the jurisdictional basis asserted in the Corps' migratory bird rule—the use of the waters as migratory bird habitat—*or* to the jurisdictional basis identified by Congress in the CWA. Congress asserted jurisdiction over fill activity because of its effect on jurisdictional "waters of the United States"—not over waters because of the commercial nature of the fill activity. The principle that Corps jurisdiction rests on a connection between the *water* and interstate commerce is apparent not only in the language of the CWA, but also in the Corps' regulatory preamble setting forth the migratory bird rule (51 Fed. Reg. at 41,217), and in more recent guidance documents. *E.g.*, EPA, *WILSON* GUIDANCE (reprinted in Br. of Center for Individual Rights, App. 6-8) (discussing basis for showing isolated water bodies have a nexus with interstate commerce, without mentioning the nature of fill activity); see CORPS, CLEAN WATER ACT JURISDICTION OVER ISOLATED WATERS (1987 "final version" of draft Corps' field guidance, reprinted in Br. of Serrano Water Dist. *et al.*, App., Exh. 24) ("An interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. * * * [T]he fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody"). We are aware of *no* prior suggestion by the Corps that the commercial nature of SWANCC's balefill is a proper basis for its jurisdiction, and of *no* prior suggestion by the Corps or EPA that the nature of fill activity is the appropriate place to look for a jurisdictional nexus over isolated waters—and the Solicitor General cites none in his brief. "[A]ppellate counsel's post hoc rationalizations for agency action" are generally unavailing. *Burlington*

Truck Lines v. *United States*, 371 U.S. 156, 168 (1962). Here they are at odds with both statutory and regulatory bases of jurisdiction.[4]

In addition, the distinction between facial and as-applied challenges makes no sense when the government relies on the aggregation principle to regulate *an entire class of activities*. The premise of the Corps' Commerce Clause argument is that it may regulate the filling of isolated waters that do or may provide habitat for migratory birds because that class of activities *in the aggregate* has a substantial effect on interstate commerce. U.S. Br. 36-37 & n.28. The government has previously represented to this Court that, where an entire class of activity is brought within federal power by the aggregation principle, *"case-by-case inquiry regarding impacts on interstate commerce is inappropriate."* *Lopez*, No. 93-1260, U.S. Reply Br., at 4 (filed Aug. 17, 1994) (emphasis added). Instead, a court determines the nature of regulated conduct—and assesses whether it is within the commerce power—by looking to the *statute or regulation* at issue and the *class* of activities it covers, rather than to the facts of an individual case. See *Maryland* v. *Wirtz*, 392 U.S. at 197 n.27 (nexus to interstate commerce in individual case irrelevant under aggregation principle); *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942) (same).

In *Lopez*, for example, this Court noted that "by its terms [the Gun-Free School Zones Act] has nothing to do with 'commerce' or any sort of economic enterprise," and concluded

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[4] The Corps would not disclaim jurisdiction over SWANCC's site if SWANCC proposed to make a non-commercial use of the property that involved discharging fill into ponds. Indeed, the Corps states that it has jurisdiction over "a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor" (U.S. Br. 46 n.37), as well as "wet meadows," "drainage ditches," and "swimming pools." 51 Fed. Reg. at 41,217. That SWANCC's property is subject to ongoing federal regulation, whether or not the balefill goes forward, highlights the irrelevance of the commercial nature of the currently proposed use to the propriety of the Corps' rule.

that the class of regulated conduct ("possession of a firearm in a local school zone") was outside the commerce power, *despite the fact that the case involved "commercial" activity*—the delivery of a gun for a fee. 514 U.S. at 561, 563; see Pet. Br. 46. In *Morrison*, this Court considered whether the activity *regulated under the statute*, rather than the conduct challenged in the individual lawsuit, was within the commerce power. 120 S. Ct. at 1749. The same principle applies here: the bird rule encompasses *all* discharges into water used as an actual or potential habitat by migratory birds, and *that* is the class of activities that must fall within the commerce power—not the activities undertaken by a group of municipalities seeking to build a landfill in one individual instance of regulation.[5]

c. The Corps concedes that the migratory bird rule gives it jurisdiction over a host of non-commercial activities, like walking, bicycling, or driving through a wetland (58 Fed. Reg. at 45,020), or a homeowner's filling in wet patches of backyard himself. U.S. Br. 46 n.37.[6] It contends that the bird rule should

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[5] Bartlett (at 27) and the Corps (at 14) suggest that the standard for upholding federal power is lower when conduct may affect the environment in more than one state. Nothing in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), or any other decision suggests that the subject matter of regulation determines the level of Commerce Clause scrutiny. In *Hodel*, the Court upheld a statute regulating surface coal mining—a commercial activity that Congress expressly found affected interstate commerce—against a challenge that it was outside the commerce power. We *agree* that the commerce power is broad enough to permit regulation of activities that affect the environment in more than one state, provided those activities are commercial and substantially affect commerce under *Lopez* and *Morrison*. But environmental effects per se are not the focus of the Commerce Clause, any more than are education or protecting women from violence.

[6] The Corps asserts that *some* of these non-commercial activities are "quasi-economic" like the homegrown wheat consumption in *Wickard*. U.S. Br. 46 n.37. But in *Wickard*—"perhaps the most far

nonetheless be treated as a regulation of economic conduct because loss of migratory bird habitat is "caused overwhelmingly by commercial activities." U.S. Br. 45-46 & n.35. Like its claim that the migratory bird rule should be upheld because of the commercial nature of the conduct in this case, the Corps' argument cannot be reconciled with the "class of activities" analysis of the aggregation doctrine. We do not dispute that Congress could choose to regulate commercial landfills or other commercial conduct that displaces the habitat of migratory birds. But regulation of waters used by birds "has nothing to do with 'commerce' or any sort of economic enterprise," nor is it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. By failing to limit itself to a class of activities within constitutional bounds, the Corps has lost the opportunity to claim that this case falls within them. See *Morrison*, 120 S. Ct. at 1752 (distinguishing between a narrower cause of action hinged on a jurisdictional element, which might be constitutional, and a cause of action giving remedy for "wider, and more purely intrastate, body of violent crime," which is not).

d. Finally, the Corps asserts (at 44) that a looser standard should be applied to assess the constitutionality of its migratory bird rule because "the Corps' determination that particular activities fall within its permitting authority does not mean that such activities are prohibited." The Corps cites nothing but an obviously inapplicable Takings Clause case for this bizarre contention, which rests on the belief that overreaching federal regulation is permissible unless the permit process is "unduly

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reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560)—the regulated production of wheat by commercial farmers was indisputably commercial. See 317 U.S. at 115-116. The closest analogy here would be federal regulation of home gardening, which *Wickard* did *not* consider. And walking, bicycling, or driving through a wetland are outside even the broadest conception of "commercial" activity. See Pet. Br. 37-38.

burdensome" or results in denial of a permit. U.S. Br. 44-46 & n.35. The Corps could not satisfy its own test here, where it twice denied SWANCC a permit after putting SWANCC to millions of dollars of expense and causing years of delay. The Corps' claim that agency jurisdiction is judged under less stringent standards than an agency decision on the merits is wrong as a matter of law; this Court applies the same analysis to both. *Morrison*, 120 S. Ct. at 1746-1747; *Summit Health*, 500 U.S. at 324-325; *Maryland* v. *Wirtz*, 392 U.S. at 186-188; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 537-538 (1944).

2. Because the bird rule lies far *outside* the commerce power, it is of no avail to the Corps to argue that Congress in the CWA intended to reach all waters *within* the commerce power. In fact, however, Congress did *not* intend for the CWA to reach so far, as reflected by the plain language of the statute, which regulates "navigable waters." Where Congress intends to regulate all waters within its commerce power, it says so directly. *E.g.*, 16 U.S.C. § 817(1) (regulating waters "over which Congress has jurisdiction under its authority to regulate commerce"); *id.* § 797(e) (same).

a. The Corps concedes (at 18-19) that the CWA's jurisdictional term "navigable waters" requires a connection to navigable waters, but says that term is nullified by its definition as "waters of the United States." The principle that all statutory terms should be interpreted to have meaning requires that a definition be understood in light of the defined term;[7] thus, a water body must have some water-based connection to "navigable waters" to fall within "waters of the United States."

[7] Contrary to the Corps' assertion (at 19 n.12), nothing in *Sweet Home* suggests that defined terms should be read as mere surplusage. Courts consistently interpret the definition of "take" in the Endangered Species Act by reference to the defined term. *E.g.*, *Loggerhead Turtle* v. *County Council*, 148 F.3d 1231, 1237 (11th Cir. 1998) (interpreting "'[h]arass' and 'harm' within the meaning of 'take'").

Indeed, as we have explained (at 15-16), "waters of the United States" *referred* at common law to *navigable* waters.[8] The term "navigable" may be of "*limited* import" (*Riverside Bayview*, 474 U.S. at 133), but "limited" is more than none.

b. The Corps contends (at 19-20) that the CWA's goals suggest its "coverage is not confined by traditional concepts of navigability." But statutory objectives do not override statutory text (see Pet. Br. 19)—particularly where those goals apply to a multifaceted regulatory program of which Section 404 is only one small part. Notably, the government completely ignores the express statutory objective with which it disagrees, "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b).

c. The government points to Section 404(g)(1) as the "clearest textual indication" that Section 404 applies to the limits of the commerce power. U.S. Br. 20-21, 27. If this is the

[8] The Corps wrongly claims (at 18 n.11) that this traditional meaning applies only to the phrase "*navigable* waters of the United States." But the CWA refers to "waters of the United States" as "navigable waters," making it necessary to consider both terms together. Furthermore, Congress and this Court have long treated the phrases "waters of the United States" and "navigable waters of the United States" as interchangeable. River and Harbors Act, § 10, 30 Stat. 1121, 1151 (1899); *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 367 (1912); *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U.S. 406, 411 (1909). The phrase "waters of the United States" also distinguishes waters subject to federal power from interior waters *of the States*—a distinction that disappears entirely under the Corps' approach. See *Donnelly*, 228 U.S. at 262; *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 170 (1946); *Perry*, 191 U.S. at 28. The "normal rule" is that Congress is understood to have changed such established meanings only if "it makes that intent specific," which it did not do in the CWA. *Midlantic Nat'l Bank* v. *New Jersey*, 474 U.S. 494, 501 (1986).

"clearest indication," the case should be over. The provision applies to waters beyond those navigable in fact or with improvement and their adjacent wetlands, such as non-navigable streams and tributaries that feed into navigable waters. But it simply begs the question to say it applies to isolated waters. Section 404(g)(1) does not affirmatively define the scope of waters it covers and was enacted five years *after* Section 404(a); it gives *no* guidance as to the statute's outer limits. See *Capital Gains Research Bureau*, 375 U.S. at 199-200.[9]

d. The Corps resorts to legislative history that it admits (at 24) displays "a degree of ambiguity." Legislative history—especially ambiguous legislative history—cannot "cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 & nn.17-18 (1994). In fact, however, there is no ambiguity in the legislative history as to the critical issue here. Although Congress reached beyond the narrowest common law conception of "navigable waters" as waters navigable in fact to a broad interpretation of *navigable* waters, there is no evidence that it intended to reach *all waters* despite the narrower text of the statute.

The bills passed by the House and Senate regulated discharges into "navigable waters," defined to include *only* navigable waters or waters connected to them.[10] Committee reports confirm Congress' intent to require a connection to navigable waters as a prerequisite for regulation. *E.g.*, 2 Leg. Hist. 1972

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[9] The legislative history of Section 404(g)(1) is similarly unilluminating. The Conference Report explains only that the provision permits States to regulate "discharge of dredged or fill material into the navigable waters other than traditionally navigable waters and adjacent wetlands." 3 Leg. Hist. 1977 at 288.

[10] H.R. 11896 defined "navigable waters" as "the navigable waters of the United States, including the territorial seas." 1 Leg. Hist. 1972 at 1069. S. 2770 defined them as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." 2 Leg. Hist. 1972 at 1698.

at 1495 (S. Rep.) ("Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries"). In conference, the bill was amended slightly to clarify Congress' intent to reach all waters that form part of a "continuing highway over which commerce is or may be carried." 1 Leg. Hist. 1972 at 178 (S. Conf. Rep.).[11] House floor manager Dingell's floor statement, from which the Corps selectively quotes, confirms the focus of the statutory definition on the water's use as a channel of commerce. *Id.* at 250.[12] Neither the Conference Report nor floor debate contains any hint that Congress meant to regulate all water regardless of its connection to navigable waters.[13]

e. The 1977 legislative history has little relevance in interpreting statutory provisions enacted five years earlier. See *Consumer Prods. Safety Comm'n*, 447 U.S. at 118 n.13. In any event, it does not help the Corps. The question before Congress in 1977 was not whether to approve Corps authority over all

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[11] The Interior Department had interpreted the quality standards in the Water Quality Act of 1965 to apply solely to *interstate* waters—waters that flow across State or national borders. S. DEGLER, FEDERAL POLLUTION CONTROL PROGRAMS 6-7, App., at 53, 59-60 (1971). As noted in the committee reports quoted by the Corps (at 22), Congress sought to broaden this regulatory authority.

[12] Rep. Dingell explained that the "'gist of the Federal test'" was the water's "use 'as a highway,'" citing *Utah* v. *United States*, 403 U.S. 9 (1971), and *United States* v. *Underwood*, 344 F. Supp. 486 (M.D. Fla. 1971). *Utah* involved a lake navigated by boats transporting cargo, *Underwood* a river traversed by tour boats. Both rejected the argument that federal jurisdiction was lacking if navigation occurred only within a single State. 403 U.S. at 10; 344 F. Supp. at 492.

[13] The post-CWA report of the House Committee on Operations relied on by the Corps (at 3 n.1) does no more than state the view that the Act reaches wetlands adjacent to traditional navigable waters. H.R. REP. NO. 93-1396, at 23-27 (1974).

waters with a nexus to interstate commerce, as the Corps suggests, but how best to deal with "problems created by the corps' interpretation of section 404." 123 Cong. Rec. 26,711 (1977) (Sen. Muskie). The focus of those "problems" was the Corps' briefly asserted (and quickly repudiated) statement in a press release that could require permits for "the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or a mountaineer who wants to protect his land against stream erosion." 4 Leg. Hist. 1977 at 1263, 1343, 1347, 1350, 1386; 40 Fed. Reg. 41,292, 41,292 (Sept. 5, 1975). Notably, everyone—including the members of Congress quoted by the Corps—agreed that this jurisdictional claim far overstepped statutory bounds.[14]

Some members of Congress felt that the best way to prevent future Corps overreaching was a House amendment (H.R. 3199) that would have limited "navigable waters" to waters navigable in fact or with improvements and their adjacent wetlands—a definition that would have excluded even tributaries, streams, and other waters with a surface connection to navigable waters, thereby returning federal jurisdiction to pre-1972 levels. See 4 Leg. Hist. 1977 at 1157-1158, 1218-1219, 1250. Critics successfully advocated retaining the limits of the 1972 Act to protect the "[f]ederal interest in waterways other

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[14] *E.g.*, 4 Leg. Hist 1977 at 1248-1249 (Reps. Edgar and Myers) (Corps press release "grossly distorted" scope of Section 404); *id.* at 948 (Sen. Muskie) (Corps' interpretation "expand[ed Section 404] far beyond the intent of Congress"); 123 Cong. Rec. at 26,711 (Sen. Bentsen) (federal authority over "small streams, ponds, isolated marshes, and intermittently flowing gullies * * * runs counter to the original intent of the legislation"); *id.* at 26,721-26,722 (Sen. Tower) (Corps' claim of jurisdiction over "all surface waters and wetlands" conflicts with the "original intent of navigable waters" in the CWA); *id.* at 10,418 (Rep. McKay) ("I do not think Congress intended" to give Corps authority over "any stream, ditch, or pond in the United States"); *id.* at 10,431 (Rep. Wright) (Corps' claim of jurisdiction violates "original intent of Congress").

than those on which a ship can be floated," including "small streams, marshes, wetlands, and swamps *which will make their way into the bigger waterways* of this country." *Id.* at 908 (Sen. Hart) (emphasis added). That equivocal evidence is a far cry from *Bob Jones*, where Congress rejected 13 bills to overturn an agency position and expressly approved of it in legislative enactments, or *Brown & Williamson*, where Congress enacted multiple statutes that assumed the correctness of the agency's 35-year-old stance. It is certainly not enough to show that Congress "acquiesced" in the Corps' interpretation in the face of a different interpretation supported by text and the 1972 legislative history. See Pet. Br. 24 (collecting cases).

The Corps points (at 25-27) to a handful of statements in 1977 suggesting some in Congress thought Section 404 reached broadly, but omits statements to contrary effect. For example, the Committee Report for S. 1952, the predecessor Senate bill, describes the waters subject to regulation under Section 404 as comprised of traditional navigable waters (regulable by the Corps) and "lakes, rivers, streams, swamps, marshes, and other portions *of the navigable waters* outside the corps program." 4 Leg. Hist. 1977 at 708. It explains that

> [r]estriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render [protection of the Nation's waters] impossible to achieve. Discharges of dredged or fill material *into lakes and tributaries of these waters* can physically disrupt the chemical and biological integrity of the Nation's waters and adversely affect their quality.

Ibid. (emphasis added); see, *e.g.*, 3 Leg. Hist. 1977 at 348-349 (House manager of the compromise bill said it "retains the basic principles of the House amendment" [H.R. 3199] regarding limited federal authority over non-navigable waters).

At no time during consideration of the 1977 amendments did Congress approve of Corps jurisdiction over all isolated waters with a connection to interstate commerce. Indeed, the

Corps did not seek to regulate all isolated waters until July 19, 1977—*after* passage of H.R. 3199 and just days before Senate debate on S. 1952. 42 Fed. Reg. at 37,127-37,128. Even then, Congress had no practical reason to protest the Corps' interpretation because the Corps simultaneously *exempted* virtually all isolated waters (including *all* waters less than 10 acres in surface area) from permit requirements. 42 Fed. Reg. at 37,130.[15] In these circumstances, "[i]t is impossible to assert with any degree of assurance that congressional failure" to overrule the Corps' brand new regulation shows "affirmative congressional approval" of its claim of jurisdiction over all isolated waters. *Central Bank*, 511 U.S. at 186; see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

Even if Congress *had* acquiesced in the Corps' claim of jurisdiction over all isolated waters with a connection to interstate commerce, that *still* would not show acquiescence in the migratory bird rule. There was *no* suggestion as of 1977 that the Corps could regulate an isolated water because migratory birds used it. In June 1985 the Corps was still telling Congress that migratory birds would *not* generally support jurisdiction. See *Oversight Hearings on Section 404 of the Clean Water Act before Senate Comm. on Env'tl Pollution of Comm. on Env't*

[15] Because there is no evidence that Congress was aware of and approved its 1977 regulation, the Corps relies heavily on its 1975 interim regulation. But the Corps *admitted* in 1977 that an "intent [to reach isolated wetlands] *was not clearly expressed*" in its 1975 regulations. 42 Fed. Reg. at 37,129. The 1975 regulations asserted jurisdiction over "[i]ntrastate lakes, rivers, and streams"—waters which typically are, or connect to, navigable waters—with specified, very particular commercial uses, and stated that the Corps *could* determine that particular "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters" were jurisdictional where necessary "for the protection of water quality" (not birds). 40 Fed. Reg. at 31,325. The Corps was right in 1977 that this language does not show that it meant to regulate all water to the limits of the commerce power.

and Publ. Works, 99th Cong. 114 (1985) ("The limited use of a water by a migratory species in interstate traveling has been determined to be insufficient to establish jurisdiction"); *id.* at 121-123. Only under pressure from Senators Mitchell and Chafee did the Corps later express a general policy of regulation. *Id.* at 114, 168, 190, 193. The Corps has not pointed to *any* approval by Congress of *that* step.

f. No *Chevron* deference is due to an agency interpretation that contravenes statutory text by simply ignoring the term "navigable waters" and the settled meaning of "waters of the United States." The distinction between waters with a hydrologic connection to navigable waters and other types of waters is not "unclear" (U.S. Br. 31), but grounded in the text itself.

Furthermore, deference does not apply because three established rules of statutory construction—avoidance of constitutional doubt, a presumption against significant intrusions on state authority, and the rule of lenity—leave no ambiguity in the statute. Pet. Br. 26-36. The Corps offers *no* explanation why the rule of lenity does not apply. It claims (at 32 n.23) that the avoidance principle is inapplicable because *it* has authority to decide what activities are sufficiently connected with interstate commerce to fall within federal power. That argument —identical to one rejected last Term in *Jones*, see U.S. Br. 13-17 in No. 99-5739 (filed Feb. 7, 2000)—assumes that Congress intended to delegate the full scope of its power to the Corps. Congress' intent to do so is hardly clear; that is why the avoidance principle applies. See Pet. Br. 13-16.[16]

[16] The Corps claims that *Darby* defuses the serious delegation problems raised by its interpretation. But *Darby* involved statutes in which Congress expressly defined the nexus to interstate commerce required for regulation. 312 U.S. at 119-120. Here, the Corps considers itself unfettered by a congressionally-chosen nexus, free to decide that *any* type of effect on interstate commerce, caused by *any* type of conduct, will support federal regulation. It claims, in short,

Remarkably, the Corps asserts (at 33-34 & n.25) that its regulation of isolated waters used by migratory birds does not intrude on traditional areas of state and local authority because the Corps considers local interests in making permitting decisions. The Corps reviews state and local land use decisions in light of its view of "the public interest," engaging in a "general balancing" of factors including "economics," "aesthetics," "land use," "the needs and welfare of the people" (33 C.F.R. § 320.4(a)(1)), and the "practicability of * * * alternative locations" (*id.*, § 320.4(a)(2)(ii)), and it freely rejects "local * * * decisions" whenever it thinks issues of "national importance" are "overriding." *Id.*, § 320.4(j)(2). There can be no doubt, as these factors and the 47,000 page record attest, that Section 404 permitting is in the nature of general land use regulation. Here, the Corps overrode considered decisions of Illinois, Cook County, and SWANCC (a 23-member municipal corporation representing 700,000 people) concerning the need for and environmental suitability of SWANCC's balefill. The Corps has delayed by more than a decade SWANCC's effort to find a local solution to the problem of disposing of local garbage and has wasted tens of millions of dollars of public money. This massive intrusion on state sovereignty is the hallmark of Corps regulation. It blatantly contradicts Congress' expressly-stated intention "to recognize, protect, and preserve the primary rights and responsibilities of States" in this field. 33 U.S.C. § 1251(b).

The Corps does not contest our description (Pet. Br. 34-36) of the troubling history of the "other waters" and bird rules. To the contrary, it admits (at 3-4) that it is really asking this Court to defer to the unexplained decision of the district court in *Callaway*, which ordered the Corps to overturn its prior interpretation and expand its jurisdiction "to the maximum extent permissible under the Commerce Clause." 392 F. Supp. at 686; see Pet. Br. 34. The Corps simply acquiesced in that order.

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the power to make law. That view is unprecedented and raises sufficient constitutional problems to warrant its rejection. See Pet. Br. 33-34.

Ultimately, the government claims deference (at 31) because it is "reasonable" to interpret Section 404 as "a jurisdictional standard that turns on the *prospect of interstate effects* resulting from water pollution, rather than on a particular causal mechanism * * * by which those effects may be produced" (emphasis added). This nebulous "standard" forsakes the CWA's text, which regulates the "navigable" "waters of the United States," for a speculative, elastic, and unconstrained focus on "prospect[ive] effects": *any* discharge into *any* water that has the *prospect* of some interstate effect. That interpretation gives the statute's "limiting language" "no office," rides roughshod over traditional State powers, and is therefore patently *un*reasonable. *Jones*, 120 S. Ct. at 1911.[17]

3. The Corps makes several misleading factual statements. First, it misrepresents (at 6, 8) that SWANCC's proposed balefill is "directly above an aquifer that supplies drinking water to the region," and that there is a risk of contamination if the project goes forward. In fact, as the Corps told Congress, the site is 3,000 feet away from the aquifer and poses a "negligible risk" "so small and trifling that it may safely be disregarded." AR 38332-38333. Directly below the site is 40 feet of bedrock, topped by 21 feet of impervious clay, which would be buffered by more compacted clay and a synthetic liner; furthermore, the Corps observed, the site's "inward gradient" means water will "seep into the project rather than out." *Id.* at 38327-38328, 38330. In the "highly unlikely" event of a leak, the Corps observed, it would take 20 to 40 years for

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[17] The Corps pretends (at 35 n.27) that our interpretation of the CWA would undermine federal prohibition of toxic discharges. It would not. The Solid Waste Disposal Act prohibits *all* open dumping of hazardous waste (42 U.S.C. §§ 6903(5),(14),(27), 6945(a)), and the Toxic Substances Control Act requires EPA to regulate the "disposal" of "hazardous chemical substances and mixtures" (15 U.S.C. § 2605)—powers that do not depend on the meaning of "navigable waters" in the CWA. State laws prohibiting dumping of toxic material would also be unaffected. *E.g.*, 415 ILCS 5/12, 25/1.

contaminants to reach the aquifer, "afford[ing] more than adequate response time." *Id.* at 38332. The Corps' sole aquifer-related reason for denying the permit was its belief that SWANCC's 23 municipal corporations had not "conclusively" proved that if SWANCC's $20-million-plus remediation fund were somehow exhausted, they could finance maintenance and remediation. See Pet. Br. 6, 10.[18]

Second, the Corps states (at 9 & n.8) that the Fish and Wildlife Service opposed the balefill, quoting an "initial comment letter" that predates SWANCC's final mitigation proposal. AR 16371. In fact, FWS subsequently told the Corps that SWANCC's "revised proposal adequately mitigates impacts to area-sensitive birds" and that its proposed relocation of the heron colony was "justified" and could "over time provide equivalent if not augmented nesting opportunities for these birds." AR 16371-16372. The Corps' willingness to twist these facts matches its willingness to ignore governing law in trying to defend a regulation outside its statutory and constitutional authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[18] Bartlett claims (at 14, 17 n.6) that a Congressional enactment that required the Corps to *report* to Congress on the effect of SWANCC's proposed landfill on the water quality of the aquifer, "demonstrates tacit Congressional approval of the assertion of [CWA] jurisdiction." This rider to a bill authorizing appropriations contains no suggestion that Congress approved, or even considered, Corps jurisdiction, and this Court presumes that such measures make no change in existing law. See *TVA* v. *Hill*, 437 U.S. 153, 189-192 (1978).

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SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, JOINED BY THE SOLID WASTE ASSOCIATION OF NORTH AMERICA, AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers' migratory bird rule exceeds the scope of the Clean Water Act.

2. Whether the migratory bird rule is a reasonable interpretation of the Clean Water Act entitled to deference.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.[2]

Solid waste disposal is one of the most important public services provided by *amici*. Twenty-three Illinois municipalities, with a population of 700,000, formed petitioner Solid Waste Agency of Northern Cook County to find a safe and efficient means of addressing the region's solid waste disposal needs. Towards this end, petitioner undertook a public project of more than $ 20 million, purchasing 533 acres containing a former strip-mine site to serve as a balefill, and after extensive public hearings obtained approvals from local zoning authorities, the county board of commissioners and the Illinois Environmental Protection Agency.

The U.S. Army Corps of Engineers (Corps), however, concluded that 17.6 acres of isolated bodies of water on the site were "waters of the United

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

[2] A substantial majority of the members of *amicus* Solid Waste Association of North America are municipal, county, and regional public officials who are responsible for managing government-owned or government-sponsored solid waste systems.

States" subject to the section 404 permit requirement of the Clean Water Act (CWA). Although the ponds on the site are not hydrologically connected to navigable waters, the Corps denied petitioner's permit application because migratory birds use the site as a habitat. The legal basis for the Corp's permit denial was the migratory bird rule, decreed by EPA and the Corps fourteen years after the enactment of the Clean Water Act.

The language of the Clean Water Act utterly fails to support the migratory bird rule and the Corps' sweeping assertion of jurisdiction over huge areas of the country hitherto subject to state and local environmental and land use regulation. As this case illustrates, the migratory bird rule has the potential to disrupt other important public projects.

Because of the importance of the issues presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. The text and legislative history of the Clean Water Act demonstrate that the migratory bird rule is contrary to Congress' intent. Section 404(a) of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into *the navigable waters* at specified disposal sites." 33 U.S.C. § 1344(a) (emphasis added). The Corps' initial regulations did not assert authority to exercise section 404 jurisdiction over isolated intrastate waters based on the presence of migratory birds. Rather, the regulations limited the geographic reach of section 404 to waters deemed navigable under the

traditional navigability test articulated in such cases as *The Daniel Ball*, 77 U.S. 557 (1871).

Not until 1986 did the Corps first take the position—wholly without regard to the navigability of the waters in question—that its section 404 jurisdiction extends to waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (1986). This migratory bird rule was adopted in response to two members of the Senate Committee on Public Works and Environment who disagreed with the Corps' prior position that the limited use of a body of water by birds crossing state lines was insufficient to establish jurisdiction under section 404.

Even if Congress has power to regulate isolated intrastate bodies of water with no connection to navigable waters based solely on the presence of migratory birds, neither the CWA's text nor its legislative history support the Corps' conclusion that Congress intended the CWA to effect such a far-reaching and disruptive expansion of federal authority. Land use regulation is a classic exercise of the police powers of States and local governments; the Court has consistently required that Congress' purpose be clear and manifest before it will construe federal law as displacing state authority of this genre.

The CWA defines the term "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). While Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," *United States v. Riverside*

Bayview Homes, Inc., 474 U.S. 121, 133 (1985), the relevant text is similar to the formulations Congress used in predecessor statutes. To be sure, *Riverside Bayview Homes* stated that the CWA's use of the term "navigable" is "of limited import" in holding that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133. But *Riverside Bayview Homes* does not hold that the term "navigable" is of *no* import, which is the essential premise of the migratory bird rule. As *Riverside* makes clear, a non-navigable body of water is subject to the Corps' jurisdiction only if it has a hydrologic connection to a navigable body of water. No such connection has been shown in this case.

The United States contends that the CWA's general purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" supports the Corps' assertion of jurisdiction over isolated, intrastate waters. U.S. Opp. 14 (quoting 33 U.S.C. § 1251(a)). But the CWA's statement of purpose says nothing about Section 404's geographic scope. Moreover, broad statements of statutory purpose do not reflect the "complexity of the problems Congress is called upon to address" and the "hard-fought compromises" of the legislative process. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Such generalizations are no substitute for an analysis of the statutory text, particularly in a case such as this, in which the Federal Government asserts authority over areas traditionally reserved to the States. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1870 (2000).

Finally, the legislative history does not support the Corps' assertion of jurisdiction over isolated intrastate waters based on the presence of migratory birds. The legislative record contains no indication that the CWA was intended to apply to isolated intrastate waters. *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir.), *cert. denied,* 516 U.S. 955 (1995). On the contrary, taken as a whole the legislative history manifests Congress' intent to exercise CWA jurisdiction only over intrastate waters that are themselves used as highways of commerce or have an integral hydrologic connection with navigable waters.

B. Even if Congress' intent regarding the geographic reach of the term "navigable waters" were unclear, deference to the Corps' migratory bird rule is unwarranted. The case for deference is especially weak because the migratory bird rule reflects a 180-degree change in position adopted by the Corps 14 years after the enactment of the CWA. Moreover, the rule was not the subject of notice and comment procedures but rather was adopted in response to pressure from two Senators on the Corps' oversight committee.

In *Riverside Bayview Homes* the Court applied *Chevron* deference in upholding the Corps' "other waters" rule insofar as it asserted section 404 authority over wetlands adjacent to navigable waters. In that instance, however, the Corps' rule was supported by the legislative history and by the sound scientific judgment that pollution of such areas would directly affect water quality of adjacent navigable waters. *See* 474 U.S. at 133-35. No similar scientific judgment supports the migratory bird rule's assertion of jurisdiction over isolated intrastate waters without

regard to a water body's past, present, or future navigability.

A further reason for rejecting the migratory bird rule is that it raises a grave constitutional question regarding the scope of Congress' power to regulate interstate commerce. The migratory bird rule rests, as the court of appeals recognized, on the view that Congress can regulate any intrastate activity without regard to whether it is commercial in nature, provided some link to interstate commerce can be hypothesized. *See* Pet. App. 6a-7a. The Court has repeatedly rejected this line of reasoning, most recently in *United States v. Morrison*, 120 S.Ct. 1740, 1750 (2000): "[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." The migratory bird rule, however, contains no requirement that the discharge of fill material into intrastate waters be undertaken for commercial purposes.

That there is a "'national interest of very nearly the first magnitude' in protecting [migratory] birds," Pet. App. 8a (quoting *North Dakota v. United States*, 460 U.S. 300, 309 (1983)), does not make the migratory bird rule a reasonable construction of the CWA. Congress has enacted a variety of wetlands preservation statutes that seek to protect migratory bird habitats through such measures as the outright acquisition of wetlands, easements, and conservation agreements with landowners. Congress' current use of these non-regulatory methods to protect wetlands and migratory bird habitats reinforces the conclusion that the migratory bird rule is not a reasonable

construction of the Clean Water Act. The Corps' rule is therefore not entitled to deference.

ARGUMENT

THE ARMY CORPS OF ENGINEERS' MIGRATORY BIRD RULE EXCEEDS THE SCOPE OF THE CLEAN WATER ACT AND RAISES SERIOUS QUESTIONS REGARDING THE LIMITS OF THE COMMERCE POWER

The court of appeals erroneously held that the Clean Water Act grants the Corps of Engineers authority to assert section 404 jurisdiction over the ponds located on SWANCC's site on the basis of the migratory bird rule.[3] This rule, decreed by EPA and the Corps fourteen years after the CWA's enactment, asserts jurisdiction over isolated intrastate waters based solely on the fact that migratory birds use the waters as a habitat. It was applied notwithstanding that the ponds on SWANCC's site are intrastate waters with no hydrologic connection to the navigable waters of the United States.

The Corps' application of the migratory bird rule to the SWANCC site renders the CWA's text meaningless. It likewise finds no support in the CWA's legislative history. Whatever the precise boundary Congress contemplated when it defined the term "navigable waters" in the CWA, it most assuredly does not mean waters that have no

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[3] The SWANCC site contains "over 200 permanent and seasonal ponds" that "were once gravel pits." Pet. App. 2a. "These ponds range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Id.*

connection to navigable waters. The migratory bird rule, however, is based on the premise that the concept of navigability is totally irrelevant in defining the waters subject to the CWA. And the rule further rests on a view of Congress' Commerce Clause powers which stretches them beyond constitutional limits. *See, e.g., United States v. Morrison,* 120 S.Ct. 1740, 1750 (2000). For these reasons, the migratory bird rule is invalid and the court of appeals' invocation of *Chevron* deference is misplaced. *See* Pet. App. 9a-10a (citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)).

A. The Clean Water Act's Text And Legislative History Demonstrate That The Migratory Bird Rule Is Contrary to Congress' Intent

1. Section 404(a) of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The CWA thus prohibits "the discharge of any pollutant" into the navigable waters "[e]xcept as in compliance with" the Act. *Id.* § 1311(a). The Act states that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps' initial regulations did not assert authority to exercise section 404 authority over isolated intrastate waters based on the presence of migratory birds. Rather, the regulations limited the geographic reach of section 404 to waters deemed navigable under the traditional navigability test articulated in such decisions as *The Daniel Ball,* 77 U.S. 557 (1871); *Economy Light and Power Co. v. United States,* 256 U.S. 113 (1921); and *United States*

v. Appalachian Electric Power Co., 311 U.S. 377 (1940). *See* 33 C.F.R. § 209.260(c) (1974); 39 Fed. Reg. 12,115-19 (1974).

In *NRDC, Inc., v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975), the district court held, however, that the Corps' officials had "acted unlawfully and in derogation of their responsibilities under Section 404" because the regulations did not assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause." The court gave no explanation as to how it came to the conclusion that Congress intended to exercise its commerce clause powers to their fullest extent. Based on this conclusion, the court ordered the Corps to promulgate "regulations clearly recognizing the full regulatory mandate of the" CWA. *Id.*

The Corps thereafter adopted the "other waters rule." *See* 42 Fed. Reg. 37,122 (1977); 40 Fed. Reg. 31,320 (1975). The current version of this rule – in effect since 1982—expands the term "waters of the United States" to encompass, *inter alia*:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

33 C.F.R. § 328.3 (1999). The rule thus made, and continues to make, no reference to migratory birds. Rather, the rule limited the Corps' authority to those intrastate waters which were themselves used, or capable of being used, in commercial activity. Thus, even after *Callaway,* the Corps did not assert section 404 authority over intrastate waters based merely on the presence of migratory birds.

It was not until 1986 that the Corps stated, in a preamble to its regulatory programs' final rule, that "EPA has clarified" that the "other waters rule" also included waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (1986). The "migratory bird rule" was thus never subjected to the scrutiny of notice and comment procedures, *see* 5 U.S.C. § 553, notwithstanding that it broadly expanded section 404 jurisdiction and marked a substantial departure from prior regulatory policy.

Rather, the rule was adopted in response to the criticism of two members of the Senate Committee on Public Works and Environment who took issue with the Corps' view that "[t]he limited use of a water by a migratory species in interstate traveling [is] insufficient to establish jurisdiction." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works,* 99th Cong., at 114 (1985) (*Hearings*) (statement of Sen. Mitchell). *See also id.* at 121

(Sen. Chafee). *See* U.S. EPA and U.S. Dept. of Army, *Guidance for Corps and EPA Field Offices Regarding Clean Water Section 404 Jurisdiction Over Isolated Waters In Light of United States v. James J. Wilson* 4 <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/wilson.htm>; Memorandum, from Francis S. Blake, EPA General Counsel, to Richard E. Sanderson, Acting Assist. Administrator, EPA Office of External Affairs 1 (Sept. 12, 1985), *reprinted in* Margaret N. Strand, Environmental Law Institute, *Wetlands Deskbook* 692 (2d ed. 1997). In the views of these two Senators, Congress, in enacting the CWA, asserted jurisdiction "'to the maximum extent permissible under the commerce clause of the Constitution.'" *Hearings*, at 113 (statement of Sen. Mitchell) (quoting *Callaway,* 392 F.Supp. at 686); *id.* at 121-23. *See also id.* at 170 (statement of Sen. Mitchell) (asserting actual evidence of use by migratory birds not required to establish CWA jurisdiction); *id.* at 193-94 (statement of Sen. Chafee).

2. Even if Congress has power under the commerce clause to regulate isolated intrastate bodies of water with no connection to navigable waters based solely on the presence of migratory birds, neither the CWA's text nor its legislative history support the conclusion that Congress intended such a far-reaching and disruptive expansion of federal authority. The district court's view in *Callaway* that Congress, in enacting the CWA, "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause," 392 F. Supp. at 686, ignores that such a sweeping assertion of federal power seriously intrudes on the traditional authority of state and local governments in regulating land use. *See, e.g., Village of Euclid,*

Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). The Court, however, has generally required that Congress' purpose be "clear and manifest" before construing federal law as displacing traditional state authority. *See, e.g., Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1870 (2000); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Neither the statutory text, committee reports, nor floor statements by the Act's leading proponents provide evidence demonstrating that Congress intended to regulate isolated intrastate waters with no hydrologic connection to navigable waters.

That Congress defined the term "navigable waters" to "mean[] the waters of the United States, including the territorial sea," 33 U.S.C. § 1362(7), does not establish that Congress intended to assert federal jurisdiction to the limit of the commerce power. While Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), the relevant text is similar to the formulations Congress used in the predecessor statute, the Refuse Act of 1899. *See* 33 U.S.C. § 407 ("[i]t shall not be lawful to . . . discharge . . . any refuse matter of any kind . . . into any navigable water of the United States, or into any tributary of any navigable water"). Contemporaneous with the Refuse Act, the Rivers and Harbors Appropriation Act of 1899 made it illegal to excavate or fill various navigable waters without Corps approval. *See* 33 U.S.C. § 403 (Rivers and Harbors Appropriation Act of 1899) (listing various waters) ("it shall not be lawful to excavate or fill, or in any manner to alter or

modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States"). All of these are, of course, indisputably "waters of the United States." Defining "navigable waters" as "waters of the United States" is thus plausibly viewed as a form of legislative shorthand for prior statutory formulations.

The Court has, of course, viewed the CWA's definition more broadly, stating that "the Act's definition . . . makes it clear that the term 'navigable' as used in the Act is of limited import." *Riverside Bayview Homes, Inc.*, 474 U.S. at 133. But *Riverside Bayview Homes* does not hold that the term "navigable" is of *no* import, which is the essential premise of the migratory bird rule. The Court's recognition that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 133 (emphasis added), is not an endorsement of the Corps' assertion of jurisdiction over intrastate waters merely because migratory birds could use them for a habitat. Rather, Congress used a broader definition to include adjacent waters, which are not navigable, because "'[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 133 (quoting S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

As that passage makes clear, a non-navigable body of water is subject to the Corps' jurisdiction if it has a

hydrologic connection to a navigable body of water. That is fairly within the CWA because pollution of such waters will ultimately affect the water quality of navigable waters. But where a body of water has never been used in navigation and never will be, it must have a hydrologic connection to navigable waters for the Corps to assert jurisdiction. That connection is plainly lacking here. *See* Pet. App. 2a. In short, the migratory bird rule requires defining the term "navigable waters" to delete all reference to the concept of navigability, or even to a hydrologic connection to navigable waters. Such a definition, however, robs the statutory text of sensible meaning and should be rejected. *See United States v. Ryan,* 284 U.S. 167, 175 (1931).

The United States nonetheless contends that the CWA's general purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" supports the Corps' assertion of jurisdiction over isolated waters. U.S. Opp. 14 (quoting 33 U.S.C. § 1251(a)). But the CWA's purpose says nothing about the geographic scope of the statute. Taken to its logical conclusion, Section 1251 would justify defining "waters of the United States" to include every body of water in the country including skating and fishponds, to prevent the alteration of their "chemical, physical and biological integrity."

As the Court has often recognized, broad statements of statutory purpose do not reflect the "complexity of the problems Congress is called upon to address" and the "hard-fought compromises" of the legislative process. *Board of Governors v. Dimension Fin. Corp.,* 474 U.S. 361, 373-74 (1986). Such statements provide little aid in construing specific

textual provisions, which remain the best indicia of Congressional intent. *See id.* at 373. This rule of construction applies with particular force, where, as here, the Federal Government asserts authority over areas traditionally reserved to the States.

Indeed, if Congress had intended to apply the CWA to isolated intrastate waters based on the "affecting commerce" rationale, it would have clearly expressed this intent, as it did in other statutes. *See* Civil Rights Act of 1964, § 201(b) & (c), codified at 42 U.S.C. § 2000a(b) (defining various intrastate businesses as "place of public accommodation . . . if its operations affect commerce"); *id.* § 2000a(c) (defining "operations of an establishment affect[ing] commerce"). The absence of similar language in the CWA demonstrates that Congress did not intend the far-reaching assertion of federal authority embodied in the Corps' migratory bird rule.[4]

3. The legislative history likewise does not support the assertion of federal jurisdiction over isolated intrastate waters based on the presence of migratory birds. The voluminous materials comprising the legislative record do not contain a single mention that the Act was intended to apply to isolated intrastate waters. *See Leslie Salt Co. v. United States,* 55 F.3d 1388, 1394 (9th Cir.), *cert. denied,* 516 U.S. 955 (1995). And the various discussions of the term "navigable waters" do not remotely sanction the expansive assertion of jurisdiction adopted by the Corps. The Senate Report, which *Riverside Bayview Homes* quoted with approval, explains:

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[4] Congress might also have included the requisite jurisdictional element in the CWA, *see Morrison,* 120 S.Ct. at 1751, which it likewise declined to do.

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirement must be made to the navigable waters, portions thereof, and their tributaries.

Sen. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. at 3742-43.

To be sure, the Conference report states that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Sen. Conf. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822; *see also* H.R. Rep. No. 92-911, at 131 (1972). That is not the same, however, as asserting the exercise of commerce clause powers over intrastate activities in the manner of *Wickard v. Filburn,* 317 U.S. 111 (1942). Rather, it is merely a rejection of "the old, narrow definitions of navigability, as determined by the Corps of Engineers," and the assertion of jurisdiction over waters based on the then "more recent judicial opinions which have substantially expanded [the] limited view of navigability—derived from the Daniel Ball case—to include waterways which would be 'susceptible of being used . . . with reasonable improvement,' as well as those waterways which include sections presently

obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." 118 Cong. Rec. 33,756-57 (1972) (statement of Rep. Dingell) (citations omitted).

Nor is the Corps' broad interpretation of the term "navigable waters" supported by the Court's holding, one year prior to the enactment of the CWA, that the Great Salt Lake, a wholly intrastate lake, was navigable water for purposes of the equal footing doctrine. *See Utah v. United States,* 403 U.S. 9, 11 (1971). This decision explained that "the gist of the federal test" was that the lake had earlier "served as a highway" of commerce "and it is that feature that distinguishes between navigability and non-navigability." *Id.* Indeed, on the floor, Representative Dingell made express reference to the *Utah* test in explaining that "[t]he 'gist of the Federal test' is the waterway's use 'as a highway,' not whether it is 'part of a navigable interstate or international commercial highway.'" 118 Cong. Rec. at 33,757 (quoting 403 U.S. at 11). Thus, while intrastate waters can be "navigable," the CWA clearly contemplates that the waters be used as a highway of commerce.

Consistent with this understanding, Senator Muskie, who led the effort to enact the CWA in the Senate, remarked:

> It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a

> continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

118 Cong. Rec. at 33,699.

These statements refute the suggestion that Congress intended for the CWA to apply to isolated intrastate waters based on the presence of migratory birds. Taken as a whole, the legislative history manifests Congress' intent to exercise CWA jurisdiction over those intrastate waters which were themselves used as "highways" of commerce. Indeed, notwithstanding that prior to the CWA's enactment the Court had upheld Congressional regulation of intrastate activity which had a substantial effect on interstate commerce, *see, e.g., Katzenbach v. McClung,* 379 U.S. 294, 302 (1964); *Wickard v. Filburn,* 317 U.S. 111, 125 (1942), the legislative history contains no assertion of the need to regulate isolated intrastate waters to protect the interstate market in fish or tourism. The absence of any such comments in the committee reports or floor statements manifests that Congress intended that the CWA's geographic limit would be largely determined in accordance with the judicial definition of navigability and not on a water body's use or potential use in commercial activities.

The United States, however, points to the legislative history of the 1977 amendments to argue that Congress acquiesced in the Corps' expansion of its jurisdiction. *See* U.S. Opp. 16-17. According to the United States, "Congress was well aware that the

Corps' regulations, promulgated July 19, 1977, asserted jurisdiction over all waters, including isolated waters, to the maximum extent constitutionally permissible." *Id.* at 16. Because in 1977 "Congress considered, but ultimately rejected, several proposals to modify the Corps' geographic jurisdiction," the Corps' "other waters rule" should be deemed consistent with the intent of the 1972 Congress. *Id.* The United States thus contends that "the 1977 amendments 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [CWA] to control pollution to the fullest constitutional extent.'" *Id.* at 16 (quoting 123 Cong. Rec. at 39,209 (1977) (Statement of Sen. Baker)); *see also* S. Rep. No. 370, at 75 (same).

This argument fails for several reasons. First, the view expressed in Senate Report No. 370 and by Senator Baker provides no basis for inferring the intent of the earlier enacting Congress. *See, e.g., Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 484-85 (1997) (quoting *United States v. Price,* 361 U.S. 304, 313 (1960) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'")); *O'Gilvie v. United States,* 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute").

Second, the contention that the 1977 Congress' failure to overturn the Corps' new and broader assertion of jurisdiction amounts to acquiescence is misplaced. Initially, the Corps did not interpret the "other waters rule" to assert jurisdiction over isolated intrastate waters on the basis that migratory birds used them as a habitat. While the rule did go beyond the clear intent of the 1972 Congress, it plainly

required that a body of water must itself be used for commercial activity to be subject to section 404. Moreover, the Corps simultaneously issued a nationwide permit allowing "discharges of dredged or fill material into natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are either fed or drained by a river or stream above the headwaters, or isolated and not part of a tributary system to navigable waters of the United States or interstate waters." 42 Fed. Reg. 37,130 (1977). It is no surprise that Congress did not overturn the new rule, for while the Corps, in the "other waters rule," asserted broader geographic jurisdiction, the same rulemaking essentially disclaimed it over "most of these waters." *Id.* at 37,128.

Finally, for nine years following the promulgation of the "other waters rule," the Corps took the view that "[t]he limited use of a water by a migratory species in interstate traveling [is] insufficient to establish jurisdiction." *Hearings,* at 114 (statement of Sen. Mitchell). Thus, whatever the actions of the 1977 Congress indicate about the intent to expand the jurisdictional reach of the CWA to protect adjacent wetlands, *see Riverside Bayview Homes,* 474 U.S. at 136-139, they say nothing about the propriety of applying the other waters rule to isolated intrastate waters.

As the foregoing demonstrates, the text and legislative history establish that the migratory bird rule is "manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. As *Chevron* dictates, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The court of appeals thus

erred when it proceeded to the second step of the *Chevron* inquiry and deferred to the Corps' migratory bird rule as a reasonable interpretation of the CWA. *See* Pet. App. 10a.

B. The Migratory Bird Rule Is Not Entitled To Deference

Even if the Court were to find Congress' intent unclear with respect to the geographic reach of the term "navigable waters," deference to the Corps' migratory bird rule is unwarranted. While deference to an agency's interpretation of a statute it is charged with administering is appropriate when that interpretation is "reasonable," *see Chevron,* 467 U.S. at 843-45, several factors demonstrate that the Corps' rule is not a "reasonable" reading of the CWA.

1. The case for deference is especially weak because the migratory bird rule is not a contemporaneous construction of the statute. While "'[a]n initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis,'" *Rust v. Sullivan,* 500 U.S. 173, 186 (1991) (quoting *Chevron,* 467 U.S. at 863-64), the Corps' change in position is neither the result of any "reasoned analysis" nor informed rulemaking. *Id.* at 187 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983)). The Corps did not adopt the migratory bird rule in either its initial rulemaking, *see* 39 Fed. Reg. 12,115-19 (1974), or the subsequent rulemaking which promulgated the "other waters rule." *See* 42 Fed. Reg. 37,122 (1977). Indeed, the Corps initially took the view—in the words of Senator Mitchell—that "[t]he limited use of a water by a migratory

species in interstate traveling" is "insufficient to establish jurisdiction." *Hearings*, at 114. The rule's adoption was thus a 180-degree change in position, which occurred fourteen years after the CWA's enactment.

The Corps' "about face" might be unobjectionable if it had engaged in "informed rulemaking." But the migratory bird rule was not subject to notice and comment procedures. *See* 51 Fed. Reg. at 41,217 (1986). Rather, in response to the unrelenting pressure of two Senators on its oversight committee, the rule was simply decreed as a fait accompli. *See id.* ("EPA has clarified that waters of the United States . . . also include . . . waters . . .[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or would be used as habitat by other migratory birds which cross state lines[.]"). Neither EPA nor the Corps had any interest in the views of the public or of state and local governments. While the court below reasoned that the migratory bird rule is only an interpretive rule and thus was not subject to the APA's notice and comment procedures, *see* Pet. App. 11a, these circumstances provide further reason why *Chevron* deference is inappropriate.

It is true that the Court in *Riverside Bayview Homes* applied *Chevron* deference in upholding the Corps' "other waters rule" insofar as it asserted section 404 authority over wetlands adjacent to navigable waters. *See* 474 U.S. at 131-35. In this respect, however, the Corps rule found substantial support in the legislative history and ultimately rested on the sound scientific judgment that pollution of such areas would directly affect water quality of adjacent navigable waters. *See id.* at 133-35. As the

Corps, in a passage of the "other waters" rulemaking explained,

> Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
>
> For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

42 Fed. Reg. 37,128 (1977) (quoted in *Riverside Bayview Homes*, 474 U.S. at 134). As the Court put it, "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment . . . . [W]e cannot say that the Corps' judgment on these matters is unreasonable." 474 U.S. at 135.

No similar scientific judgment supports the Corps' assertion of jurisdiction over isolated intrastate waters. On the contrary, the sole justification for that assertion of federal power is the erroneous assumption that Congress exercised its commerce clause powers to their fullest extent.

The Corps' assertion of jurisdiction over isolated intrastate waters on the basis of the migratory bird rule is even more problematic. Most significantly, migratory birds' use of a body of water as a habitat has no connection with that body's past, present, or future navigability. Moreover, the presence of migratory birds does not in any way identify those water

bodies, the pollution of which would affect the water quality of navigable waters. Indeed, with several hundred species comprising the Fish and Wildlife Service's migratory bird list, *see* 50 C.F.R. § 10.13, and their population estimated to be as high as several billion, *see* Pet. App. 7a, rare is the body of water which is not a potential habitat.[5] The Corps' rule thus reads the CWA's geographic limitation to navigable waters out of the statute. It is not a reasonable or permissible reading of the statute and is therefore not entitled to deference.

2. The Court should also reject the Corps' migratory bird rule because it raises a grave constitutional question regarding the scope of Congress' commerce clause powers. The migratory bird rule rests on the view that Congress can regulate any intrastate activity without regard to whether it is commercial in nature as long as some hypothesis can be asserted to link the activity to interstate commerce. *See* Pet. App. 6a-7a. The Court, however, has now repeatedly rejected this line of reasoning, which transmutes the commerce clause into a general police power. *See United States v. Morrison*, 120 S.Ct. 1740, 1751-54 (2000); *United States v. Lopez*, 514 U.S. 549, 564-67 (1995).

The court of appeals recognized that the migratory bird rule is not a "regulation of the channels of

[5] The Corps' assertion of jurisdiction is not limited to those water bodies that are in "actual use" by migratory birds. *See* Blake Memorandum at 3, *reprinted in Wetlands Deskbook* at 694. "[I]f a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds," it is subject to the Corps' jurisdiction. *Id.*

interstate commerce" or a "regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce." Pet. App. 5a-6a. Invoking *Wickard*, the court of appeals reasoned, however, that the migratory bird rule was a constitutionally valid "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a (quoting *Lopez*, 514 U.S. at 559). The gist of the court's rationale was that "'the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds.'" *Id.* at 7a (quoting *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993)). Because people travel across state lines to view and hunt migratory birds and spend money in pursuit of these activities, the court concluded that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce." *Id.*

The Court's recent decision in *Morrison*, however, squarely rejects the notion that the *Wickard* rationale supports regulation of non-commercial intrastate activities. As the Court explained: "*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 120 S.Ct. at 1750 (citing *Lopez*, 514 U.S. at 559-60). Section 404 and the migratory bird rule assert regulatory authority over those who seek to fill in "waters," without regard to whether they are doing so for commercial purposes. While the Court has not "adopt[ed] a categorical rule against aggregating the effects of any

noneconomic activity in order to decide [Commerce Clause] cases," it has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 1751. Because the migratory bird rule contains no requirement that a discharge of fill material into intrastate waters be undertaken for commercial purposes, the rule cannot be upheld without the Court sanctioning a dramatic expansion of Congress' constitutional authority. *See id.* at 1750-51 (commerce-based jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce").

The seriousness of this question is not diminished by the "'national interest of very nearly the first magnitude' in protecting such birds." Pet. App. 8a (quoting *North Dakota v. United States,* 460 U.S. 300, 309 (1983)). None of the migratory bird conventions which the United States has entered into requires that the contracting parties prohibit the filling of wetlands used as a habitat by migratory birds. *See* Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., 29 U.S.T. 4649, T.I.A.S. No. 9073 (1976); Convention for the Protection of Migratory Birds and Birds In Danger Of Extinction, and Their Environment, U.S.—Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990 (1972); Convention for the Protection of Migratory Birds and Game Mammals, U.S.- Mexico, 50 Stat. 1311 (1936); Convention for the Protection of Migratory Birds, U.S.—Great Britain, 39 Stat. 1702 (1916). Moreover, the Migratory Bird Treaty Act, which implements these conventions, contains no such prohibition. *See* 16 U.S.C. §§ 703-712. Thus, in contrast to *Missouri v. Holland,* 252 U.S. 416 (1920), which involved execution of a treaty obligation, the

issue here is fundamentally one regarding the scope of the commerce power. And contrary to the suggestion of the court of appeals, this Court has never held that "the regulation of migratory bird habitat is a permissible exercise of Congress' authority" under the Commerce Clause. Pet. App. 9a. Because the Corps' construction "raise[s] serious constitutional problems," it is not entitled to deference. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 486 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979).

3. That "Congress has repeatedly recognized the importance of preserving migratory bird habitat to the viability of migratory bird populations," U.S. Opp. 19 n.11, does not render the migratory bird rule a reasonable construction of the CWA. The approach Congress has thus far taken in various wetlands preservation statutes demonstrates that the migratory bird rule is plainly inconsistent with current Congressional policy. Statutes such as the Migratory Bird Hunting Stamp Act, 16 U.S.C. §§ 718-718j; the Wetlands Loan Act of 1961, 16 U.S.C. §§ 715k-3, -5; the Water Bank Act, 16 U.S.C. §§ 1301-1311; and the Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-3932, have rejected the regulatory approach of the migratory bird rule. Instead, these statutes have sought to protect migratory bird habitats through such measures as the outright acquisition of wetlands, *see* 16 U.S.C. § 3922; 16 U.S.C. §§ 715d; 718(b) & (c); 718d, purchasing "easements prohibiting fee owners from draining their wetlands or otherwise destroying the wetlands' suitability as breeding grounds," including by "filling," *North Dakota v. United States,* 460 U.S. 300, 303, 305 n.6 (1983), and entering into

"conservation agreements" with landowners in exchange for monetary payments. 16 U.S.C. § 1302. As *North Dakota v. United States* indicates, these statutes have frequently been used to acquire, either in fee or through easement, large areas of habitat such as prairie potholes that are isolated from navigable waters. *See* 460 U.S. at 304 n.4; *see generally Wetlands Desk Book*, at 77-81.[6] Congress' repeated election to protect isolated intrastate wetlands through "acquisition" and "cooperative efforts among private interests and local, State and Federal governments," 16 U.S.C. § 3901(b), highlights the unreasonableness of the migratory bird rule as an interpretation of the Clean Water Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 27, 2000

[6] Illinois has enacted both the Habitat Endowment Act, 520 Ill. Comp. Stat. 25/1—49, and the Natural Heritage Fund Act, 30 Ill. Comp. Stat. 150/1—8, to acquire habitat including wetlands. Illinois and the other States, of course, retain their general police power to protect wetlands and migratory bird habitats by means other than acquisition.

Supreme Court, U.S.
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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Army Corps of Engineers refused to grant the petitioner, a consortium of 23 municipalities, permission to turn an abandoned strip mine into a landfill. The Corps claimed jurisdiction over the site solely because migratory birds had been observed on the property.

Question presented: May the Corps, consistent with the Clean Water Act and the Commerce Clause of the U.S. Constitution, assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and those inalienable rights that were conferred by the Creator and which are acknowledged in the Declaration of Independence. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our briefs to date, we have argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, limit the powers of Congress over States. In our briefs in *United States v. Morrison*, 68 U.S.L.W. 4351 (2000) and *Jones v. United States*, 68 U.S.L.W. 4422 (2000), we explained how the Founders' notion of "separate incompetence" limits the power of Congress over private intrastate activity. In this brief, we bring together the complementary strands of "dual sovereignty" and "separate incompetence" in an effort to return to the *strong* yet *limited* federal government our Founders established.

---

[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae* or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

The vertical separation of powers between the State and federal governments is one of the structural guarantees of liberty within our Constitution. Another equally important safeguard of our freedom is the horizontal separation of powers between the coordinate branches of the federal government. That horizontal separation is threatened whenever one branch of government arrogates to itself the powers that our Founders placed exclusively in other hands.

Our Founders established a federal government with enumerated, and separated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people. If unelected elites can change the meaning of the Constitution, then we cease to be self-governing citizens and become, instead, the subjects of someone else's governance.

SUMMARY OF ARGUMENT

This case turns on the meaning of two constitutional phrases and one statutory term. The terms are:

- What is "commerce ... among the several States," as it appears in the United States Constitution in Article I, section 8, clause 3?

- What is "the executive power of the United States," as it appears in the first sentence of Article II, section 1?

- What are "the navigable waters" of the United States, as that term appears in the Clean Water Act, 33 U.S.C. § 1344?

If *any* of these terms are used in their ordinary sense, the judgment of the Seventh Circuit must be reversed. If all of these terms are twisted out of recognition to uphold federal power over private property, then perhaps our national experiment with limited government and separated power should be declared a failure.

There is some reason to be optimistic. Recent cases suggest that there is still some life in our Founders' original concept of limited government. In *Jones v. United States,* 68 U.S.L.W. 4422 (2000), this Court unanimously rejected an Executive Branch attempt to expand Commerce Clause legislation to the greatest possible extent. The Department of Justice had argued that a private residence was a building that was "used in or affecting interstate commerce," because it was financed with an out-of-state mortgage, insured by an

out-of-state insurer, and heated by out-of-state natural gas. The defendant, Dewey Jones, was sentenced to 30 years under the federal arson statute instead of the 10 year maximum penalty for the same offense under Indiana law. The government admitted that there must be some kind of nexus between interstate commerce and the predicate act, but argued that the government neither had to prove that there was an "*actual effect*" on commerce nor a "substantial effect" in each case. Brief for United States at 13, *Jones, supra* (No. 99-5739) [*emphasis in original*]. Every member of this Court recognized and rejected this threat to individual rights.

The Department of Justice prosecuted Dewey Jones under the federal arson statute because, for almost half a century, there have been no meaningful limits to Congress's power under the Commerce Clause. That began to change when this Court declared the "substantial effects" test in *Lopez v. United States*, 514 U.S. 549 in 1995. And after this Court's decision in *United States v. Morrison*, *supra*, one could no longer safely assume that Congress can regulate *anything* under the guise of commerce. For the first time since 1942, this Court has begun to insist that the power to regulate interstate commerce is part of our overall system of *limited* and *enumerated* powers. This is a time of transition.

At a time of transition like this, we suggest a long, careful look at the very first important Commerce Clause case: *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). It was an historic case in every sense of the word. The parties were fighting over a steamboat monopoly that was originally granted to Robert Fulton, the inventor of the steamboat. Daniel Webster argued the winning side. Chief Justice John Marshall wrote the majority opinion. *Gibbons* introduced a broad reading of the Commerce Clause that won the respect of the founding generation.

But *Gibbons* did not introduce an unlimited reading of the Commerce Clause. Chief Justice Marshall identified a *textual* limit on Congress's power and a *political* limit. Marshall took the text of the Constitution as he found it, rejecting both an "enlarged construction" and a "strict construction" of the words the Founders chose. He pointed to the political restraints built into the Constitution. The political accountability of the elected legislature is the only real restraint on some of the enumerated, yet plenary powers of Congress. This is a structural guarantee of liberty, and a vital part of our constitutional separation of powers.

Marshall's two restraints--the textual and the political--provide all the guidance this Court needs to resolve this case. Congress has enacted legislation intended to protect the navigable waters of the United States. A coordinate branch of government has construed "the navigable waters" so broadly as to include water-filled ditches on an abandoned strip mine in the Chicago suburbs, on the theory that migrating birds affect interstate commerce enough to create congressional power over these puddles. No Congressman has ever had to defend a vote for or against this startlingly broad reading of the Commerce Clause, however. It is the EPA that proclaimed the "migratory bird rule" that produced this result, and the Army Corps of Engineers that denies the permits on this basis.

We believe that John Marshall's emphasis on plain language and political accountability mandate a reversal of the decision below. The question here, as in last term's case of *FDA v. Brown & Williamson*, 68 U.S.L.W. 4194 (2000) is not what Congress *might* do to regulate commerce, but what the Executive Branch can do with a statute Congress has enacted for another purpose altogether. The question in *Brown & Williamson* was whether the FDA could unilaterally de-

fine tobacco as a "drug." The question in this case is whether the EPA can redefine water-filled ditches into "navigable waters." If we still believe in plain language and political accountability, the answer in this case has to be no. We therefore urge this Court to overturn the decision of the Seventh Circuit.

ARGUMENT:

BOTH THE TEXTUAL AND THE STRUCTURAL RESTRAINTS OF THE CONSTITUTION PROHIBIT THE EXECUTIVE BRANCH FROM EXPANDING THE STATUTORY TERM "NAVIGABLE WATERS" TO INCLUDE WATER-FILLED DITCHES ON AN ABANDONED STRIP MINE

A. *GIBBONS V. OGDEN* IS A SOUND FOUNDATION FOR A TWENTY-FIRST CENTURY UNDERSTANDING OF THE COMMERCE CLAUSE

In the twentieth century, America endured a World War and a Great Depression, a New Deal and another World War, a struggle for civil rights at home and a Cold War against communism. A century of struggle turned this nation into the world's lone superpower, but it led us far from our Founders' original vision of limited and enumerated federal powers. The question for the twenty-first century will be whether the federal government will continue its twentieth-century trend until it absorbs and consumes every lesser center of power, or whether America will rediscover the dual sovereignty our Founders originally envisioned.

This Court's 1999 term suggests that our Founders' vision may yet prevail. For the first time in decades, the Court placed real limits on Congress's power to expand the meaning of the Constitution and on the Executive's power to expand the meaning of statutes. *Morrison, supra*; *Brown & Williamson, supra*. There were those who were quick to criticize these rulings as "judicial activism." The Court can be active, however, without being activist. It is not activism

for this Court to exercise *its* constitutional powers when the coordinate branches of government go far beyond the boundaries of *theirs*.

If nothing ever changed, there would be no need for an active Court. But changing times require changing rules to protect unchanging values. For example, in the face of the totalitarian regimes of the 20th Century, America had to concentrate all its force into a single fist in defense of liberty.[2] But to defend liberty today, now that the threat has passed, we must exchange that fist of war for the open hand of peace.

In changing times like these, we do well to consider other times of transition. This *amicus* believes that the early twenty-first century is an ideal time to rediscover the wisdom

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[2] Justice Jackson touched on this concept in his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944). He wrote:

> When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

Korematsu, 323 U.S. at 244 (Jackson, J., *dissenting*).

of the early nineteenth century, and, in particular, the wisdom of Chief Justice John Marshall in *Gibbons v. Ogden*.

The times are more similar than one might think. In 1824, the world had just regained its breath after the terrifying years of the Napoleonic Wars, a struggle that rocked all of Europe and sucked America into the War of 1812. America was just beginning to see daylight after a long dark economic night that began with the crippling debts of the Revolutionary War. The next generation promised to be good for the still-young nation.

In the year 2000, the world has just regained its breath after a Cold War that affected the whole world. The threat of "mutually assured destruction" is fading away like a bad dream, and Americans wake up in the morning bent on the pursuit of happiness instead of the global struggle to preserve life and liberty. Our national debt is still in the trillions, but the ink in Washington is black instead of red, these days. For the first time since our nation was very young, we have the freedom to rediscover the untapped potential of America's unique system of dual sovereignty.

For we have yet to unleash the full promise of our constitutional system. Although this Court often speaks of the States as "laboratories of democracy," we have yet to achieve the possibilities of that phrase. The Tenth Amendment speaks to a system where self-governing individuals exercise individual liberties; self-governing States exercise wide-ranging sovereign powers; and a strong but limited federal government increases the security and prosperity of all without intruding upon the protected rights of any.

This Court has recently begun to move in that direction. Some critics have been quick to label these as "States' rights"

decisions, but that is a mistake. These recent decisions do not just limit the federal government in order to benefit the States. Instead, the Court has begun to revive the concept of self-government at every level: limiting federal power to promote self-governing States, and limiting State power to protect self-governing voluntary associations. *See, New York v. United States,* 505 U.S. 144 (1992) (federal government cannot co-opt State legislatures); *Printz v. United States*, 521 U.S. 898 (1997) (Congress cannot co-opt local law enforcement officials); *Boy Scouts of America v. Dale*, 68 U.S.L.W. 4625 (2000) (States cannot prohibit voluntary associations from choosing their own leaders); *California Democratic Party v. Jones*, 68 U.S.L.W. 4604 (2000) (States cannot force political parties to let members of other parties choose their candidates); *Troxel v. Granville*, 68 U.S.L.W. 4458 (2000) (States cannot force parents to allow visitation with any third party). These cases all reverse the 20th Century trend towards centralized power, replacing it with a new paradigm of self-government.

B. CHIEF JUSTICE JOHN MARSHALL BELIEVED IN SEPARATE, SOVEREIGN GOVERNMENTS WITH SEPARATE, PLENARY POWERS

That "new" paradigm, however, is hardly new. Our Founders believed in self-government. They assumed that households, churches, voluntary associations, towns, cities, counties, and States would all be able to govern themselves. They recognized, however, that there were some things that State and local governments could not handle on their own, and so they established a self-governing Union of thirteen States to do what the States were separately unable to accomplish. That federal Union was an experiment in government that has succeeded beyond their wildest expectations.

Chief Justice John Marshall had a bold, clear vision of how the new Constitution should work. Central to that vision was his concept of the relationship between the people, the States, and the new federal government. Marshall insisted that the new Union was not created by the States, and it did not merely exercise a subset of powers delegated by the States. Instead, the new government was created directly by the people themselves. This meant that the sovereign power was *separated*, not *delegated*.

This concept of separated sovereignty is crucial to understanding Marshall in *Gibbons*. The losing party in that case had urged the Court to apply a "strict construction" to the Constitution, arguing that the power to regulate commerce was an express delegation of power from the States, and that any express delegation of power should be strictly construed. *Gibbons*, 22 U.S. (9 Wheat) at 43. Chief Justice Marshall rejected the premise that the federal government was exercising powers delegated by the States. He identified a change that Justice Kennedy has since aptly called "splitting the atom of sovereignty," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1994) (Kennedy, J., *concurring*). Marshall wrote:

> When these allied sovereigns [the States] converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consid-

> eration of the instrument by which that change was effected.

Gibbons, 22 U.S. (9 Wheat) at 187.

Marshall did not view the federal government as the child of the State governments, depending for its existence on a meager allowance of power. But that did not mean he viewed the States as mere "departments" of an all-consuming federal government, either. In Marshall's view, the *people* were ultimately sovereign, and the Constitution was the instrument by which a sovereign people divided power between State and federal governments, and between the various branches of the new federal government.

C. Chief Justice Marshall Rejected Both a "Strict Construction" and an "Enlarged Construction" of the Constitutional Text

Marshall believed that all power resided ultimately with the people, but that power was dormant until delegated. Marshall saw no reason for leaving power untapped:

> The grant [to Congress] does not convey power which might be beneficial to the grantor [the people], if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.

Gibbons, 22 U.S. (9 Wheat) at 189.

Because of this view, Marshall roundly rejected arguments for a "strict construction" of the Constitution. He did not do this in a way that would trouble modern "strict constructionists," however. In fact, Marshall's rejection of a "strict construction" is a powerful argument in favor of this *amicus'* understanding of what is now known as "strict constructionism." Marshall said:

> What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle.

Gibbons, 22 U.S. (9 Wheat) at 188.

This *amicus* does contend against any "enlarged construction, which would extend words beyond their natural and obvious import." "Interstate commerce" does not naturally and obviously include the flight of migratory birds. "Navigable waters" do not naturally and obviously include water-filled ditches on an abandoned strip mine. Chief Justice John Marshall might question whether this should properly be called "strict construction," but he would not controvert the principle.

Rejecting such an "enlarged construction" does not deprive Congress of the power to do what America needs. Marshall would not "cripple the government, [and] render it unequal to the object, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent." *Gibbons*, 22 U.S. (9 Wheat) at 188. The objects of the Constitution are eloquently set forth in the Preamble of that document, and include both the promotion of

the General Welfare and the preservation of the Blessings of Liberty. Congress can and should pursue both of these objects.

Marshall's concept of legislative power is consistent with the original draft resolution that the Framers adopted at the very beginning of the Constitutional Convention. At an early stage of the Convention, the delegates adopted a definition of the "the legislative power of the United States" that included the power to legislate on every subject for which the States were "severally incompetent."[3] 1 Madison, James, Journal of the Federal Convention 362 (2d ed. 1893) [hereinafter, "Madison's Journal"]. That broad definition was subsequently refined to the enumerated list of powers now found in Article I, section 8. Marshall's robust interpretation of the enumerated powers was completely consistent with the original concept of "separate incompetence."

The Clean Water Act is a good example of legislation for which the States would have been separately incompetent. Water pollution is no respecter of State boundaries. Agricultural pesticides that drain into the headwaters of the Mississippi flow past every State on that river from Minnesota to Louisiana; sludge from the mines at the western end of Lake Superior runs through all five of the Great Lakes before reaching the Saint Lawrence Seaway; and a pig farm in the Virginia tidewater can affect algae across the Chesapeake Bay in Maryland. The States cannot reliably solve such problems one by one. But, under a separate incompetence standard, the United States *can*.

---

[3] This *amicus* has previously addressed the history and implications of the "separate incompetence" standard, with a particular emphasis on *Gibbons*, in our brief in *Jones, supra,* (No. 99-5739), pp. 5-16.

The Court has begun to note the difference between problems that are truly national and those that are merely nationwide. Truly national problems need a truly national solution, but there are nationwide problems that are truly local, which can be just as easily addressed by a range of differing solutions at the State or local level. We believe that the protection of non-migratory species may well fall into this latter category, but the protection of migratory species necessarily falls into the former.

The fact that migrating wildlife is a matter of truly national concern does not mean that Congress can protect migratory birds by just calling them "commerce," however. The Commerce Clause has had a long and twisted history. For a while, "commerce" seemed to include very little. *See Kidd v. Pearson*, 128 U.S. 1 (1888) ("manufacturing" is not "commerce"); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (prohibiting interstate shipment of goods produced by child labor is a regulation of production, not of commerce). Later, it seemed to include almost anything. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown on one's own land and fed to one's own chickens can be regulated as "interstate commerce"). On the whole, however, Commerce Clause jurisprudence has not progressed much beyond Marshall's early formulation. Congress currently seems to exercise plenary power over economic activity that affects more States than one, subject only to the political checks of the ballot box.

This Court's recent cases fit with Marshall's broad but not unlimited theory of the Commerce Clause. A plenary power over commerce does not give Congress power over things that are not commerce, like rape, *Morrison*, *supra*, or the mere presence of firearms near a school, *Lopez*, *supra*. Congress might therefore rely upon something other than the

power to "regulate … commerce among the several States" to protect migratory birds.[4]

D. THE ELECTED LEGISLATURE SHOULD EXPRESS THE WILL OF THE PEOPLE, AND THE EXECUTIVE BRANCH SHOULD CARRY IT OUT.

Marshall believed in a limited but strong government. "[T]he sovereignty of Congress, though limited to specific objects, is plenary as to those objects." *Gibbons*, 22 U.S. (9 Wheat) at 197. When it came to the power over commerce among the several States, Marshall relied primarily upon the nature of representative government to determine those limits:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints

[4] Free market conservationists argue that a system of economic incentives can accomplish the goal of protecting wildlife far better than any system of regulatory control. Under the current system, property owners are subject to severe loss whenever migratory birds may be attracted to water on their land. The prudent property owner should therefore take steps to make sure his or property cannot benefit birds. But this is madness! In a system of well-designed economic incentives, the prudent property owner would look for the optimal fit between human use and bird use , resulting in a greatly expanded range of habitats for migratory birds. Only Congress can authorize the tax credits or appropriations that would be necessary to unleash the power of the free market, however. Upholding the EPA's power in this case takes away Congress's incentive to create such economic incentives.

> on which the people must often rely solely, in all representative governments.

Gibbons, 22 U.S (9 Wheat) at 197.

Many commentators have noted that our government combines the best features of democracy (in Congress), monarchy (in the Presidency), and aristocracy (in this Court). Our Founders concentrated the executive power of the United States in a single head because the Executive Branch only *carries out* the will of the people, as that will has been expressed by Congress. It is Congress, and only Congress, that can exercise the legislative powers vested by the Constitution. U.S. Const. Art. I, § 1. If the executive power of the United States includes a power to rewrite the laws, however, the monarchical branch can oppose the will of the people instead of carrying it out. Thus the executive might be transformed from a monarchical servant of the people into a legislative tyrant of the people.

Political accountability is one of our structural guarantees of freedom. If Congress can protect the "waters of the United States" and leave it up to the EPA to define those "waters" under the broadest possible interpretation of the Commerce Clause, then Congress could just as easily lay claim to the "money of the United States" and leave it up the IRS to decide what that is under the broadest possible interpretation of the Sixteenth Amendment. And since that Amendment allows Congress to "lay and collect taxes on incomes, from whatever source derived," that broadest possible interpretation would allow the IRS to claim every penny any American ever earned. We dare not leave the scope of congressional power to be determined by the Executive Branch.

Marshall's concept of political checks on the plenary commerce power took on new life in two recent decisions. In *Brown & Williamson, supra*, five members of this Court refused to defer to an Executive Branch rule that expanded the term "drug" to include tobacco. And in *Jones, supra*, every member of the Court agreed that the Justice Department was wrong to construe the term "in or affecting interstate commerce" so broadly as to convict a man for throwing a Molotov cocktail into his cousin's living room.

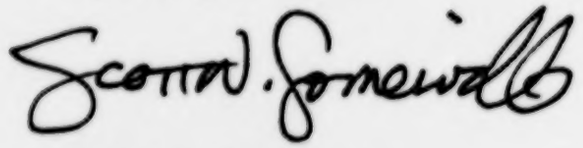
This last precedent, all by itself, should be sufficient to determine the outcome of this case. This Court unanimously overturned the conviction of Dewey Jones, even though the Executive Branch construed a Commerce Clause statute so broadly that almost every building in America "affected interstate commerce." Now, the Executive Branch is trying to convert almost any puddle in America into "navigable waters." Some people may value the liberty of a petty arsonist more than the property of a consortium of Chicago suburbs. Nevertheless, the constitutional principles of limited government, separation of powers, and individual rights are the same, whether what is at stake in the case is 20 extra years in jail or the right to develop a landfill. This Court did the right thing when it ruled against the Department of Justice in favor of a convicted arsonist like Dewey Jones. The right thing now is to rule against the Army Corps of Engineers and set 23 municipalities free to convert an abandoned strip mine into a landfill.

CONCLUSION

John Marshall believed in plain language and political accountability. Those two principles are all that are needed to determine the outcome of this case. There are a number of ways that Congress can protect the habitat of migratory

birds, but all of them require elected legislators to justify their actions to the voters. There is no such accountability when unelected Executive Branch officials stretch the term "navigable waters" to include the water-filled ditches on an abandoned strip mine. The EPA, just like the FDA in *Brown & Williamson, supra*, has twisted the plain language of statutes to mean something altogether other than what Congress originally intended. This is an unconstitutional exercise of the legislative power of the United States, which this Court should reject. We therefore urge this Court to overturn the decision below.

Respectfully Submitted,



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No. 99-1178

IN THE

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Petitioner,

v.

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Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the temporary presence of a migratory bird on an isolated, intrastate wetland can support, under the Commerce Clause, the assertion of federal jurisdiction over private property.

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BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioner and respondents have consented to the filing of this brief in letters that have been lodged with the Clerk.

process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g., Gibbs* v. *Babbitt*, No. 99-1218, 2000 WL 726073 (4th Cir. June 6, 2000); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF is also involved, including *Gibbs* and *National Ass'n of Home Builders*.

STATEMENT

1. The Clean Water Act prohibits the discharge of any "pollutant," including fill materials, into "navigable waters" without a permit from the United States Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The "navigable waters" subject to the Corps' jurisdiction are defined in the Act only as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Corps has promulgated regulations defining the "waters of the United States" as, *inter alia*, "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and "[a]ll other waters such as *intrastate* lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . . ." 33 C.F.R. § 328(a)(1), (3) (1995) (emphasis added).

In a 1986 preamble to its regulations, the Corps observed that the Environmental Protection Agency had indicated that the "waters of the United States . . . also include" intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," or "[w]hich are or would be used as habitat by other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). "For lack of a better term, perhaps, this language in the preamble has been described as the 'migratory bird rule.'" Pet. App. 15a. The question in this case is whether the Corps' interpretation of the Clean Water Act is constitutionally sufficient to support the exercise of federal jurisdiction.

2. Petitioner Solid Waste Agency of Northern Cook County (SWANCC) purchased a 533-acre parcel of land in Illinois to use as a landfill. Part of the tract had previously been used for strip mining, which left a "labyrinth of trenches and other depressions" on the land. Pet. App. 2a. These man-made basins, some of which fill with rainwater only seasonally, "range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.* Because petitioner's operations would "require the filling of approximately 17.6 acres of semi-aquatic property" (Pet. App. 3a), petitioner applied to the Corps for a fill permit pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a).

Although the Corps initially determined that the property did not encompass "waters of the United States," and thus did not fall within the Corps' regulatory jurisdiction, the Corps changed position when it was informed that migratory birds had been observed on the site. "This new information made all the difference to the Corps, because of the so-called migratory bird rule." Pet. App. 4a. The Corps determined that the presence of migratory birds rendered the ponds and puddles on petitioner's property "waters of the United States" subject to the Corps' jurisdiction under the Clean Water Act.

3. After concluding that it had the power to regulate petitioner's property, the Corps denied petitioner's request for a Section 404 permit. This lawsuit, in which petitioner challenged (*inter alia*) the constitutionality of the migratory bird rule, then ensued.

a. The district court granted summary judgment for the Corps. According to the court, "the cumulative degradation of intrastate waters could have a substantial effect on interstate commercial interests relating to [migratory] birds." Pet. App. 20a. As a result, the court concluded that "a federal agency may assert jurisdiction over intrastate waters even if the destruction of those particular waters will not have a substantial effect on interstate commerce and there is no evidence that migratory birds support human commercial activity there." *Ibid.*

b. The court of appeals affirmed. The court said that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce." Pet. App. 7a. Even though "[t]he effect may not be observable as each isolated pond used by the birds for feeding, nesting and breeding is filled," the court concluded that "the aggregate effect is clear, and that is all the Commerce Clause requires." *Ibid.*

SUMMARY OF ARGUMENT

The Corps of Engineers' "migratory bird rule" exceeds the authority conferred on the federal government by the Commerce Clause, and the Corps' assertion of regulatory jurisdiction over petitioner's property should, therefore, be invalidated as unconstitutional.[2]

1. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), this Court made clear that the Commerce Clause includes judicially enforceable outer limits. Within those limits, the Court's cases have recognized three broad categories of activity that Congress can regulate: (a) the channels of interstate commerce, (b) the instrumentalities of interstate commerce, and (c) activities that substantially affect interstate commerce.

a. The migratory bird rule cannot be sustained as a regulation of the channels of interstate commerce. Although certain *navigable* waters may constitute such channels, the isolated ponds and ditches on petitioner's property do not constitute navigable waters under even the most lenient of this Court's Commerce Clause precedents. *See, e.g., Kaiser Aetna* v. *United States*, 444

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[2] The constitutionality of the migratory bird rule need be resolved only if this Court makes the antecedent determination that the Corps' construction of the Clean Water Act is a permissible interpretation of the statute. *See* note 3, *infra*.

U.S. 164, 171-74 (1979) (citing, *inter alia*, *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940)).

b. Nor can the migratory bird rule be sustained as a regulation of things in interstate commerce. Although interstate commercial transactions involving animals, once captured, may be subject to regulation under the commerce power, animals in their feral state are the property of no one and, therefore, do not constitute articles or instrumentalities of commerce.

c. As the court of appeals recognized, the migratory bird rule can be sustained only if it regulates activity that has a substantial effect on interstate commerce. Pet. App. 6a. In making that determination, the Court must consider (i) whether the regulation reaches economic activity, (ii) whether the link between the regulated activity and interstate commerce is direct or attenuated, (iii) whether the regulation includes an express jurisdictional element, and (iv) whether Congress has made findings regarding the regulated activity's effect on commerce. *Morrison*, 120 S. Ct. at 1749-51. As in *Lopez* and *Morrison*, each of those factors indicates that the migratory bird rule exceeds the commerce power.

i. The actual or potential presence of migratory birds on petitioner's property does not involve commercial transactions or economic activity. As a result, the court of appeals erred in "aggregating" the cumulative and speculative effects on commerce of the destruction of migratory bird habitats nationwide. Rather, the Corps must establish that the activity on the land to be regulated would have a substantial effect on commerce, which it has not done (and cannot do).

ii. The connection between the activity the Corps seeks to regulate and interstate commerce is exceedingly attenuated. The court impermissibly "pile[d] inference upon inference" in concluding that, because some people cross state lines to hunt or observe migratory birds, the filling of 17.6 acres on petitioner's property could have a substantial effect on interstate commerce. *See Lopez*, 514 U.S. at 567. The court of appeals' reasoning has no logical stopping point. If accepted, the federal government could regulate all of the Nation's lands and waters, as well as every bird, beast and fish, under the guise of the commerce power.

iii. The migratory bird rule contains no jurisdictional element to ensure that the requisite nexus with interstate commerce is present. Although migratory birds might (or might not) cross state lines, the self-propelled flight of birds cannot provide the necessary nexus because the birds themselves are not in interstate commerce. A contrary conclusion would mean that the federal government could regulate every pond and puddle that might be visited by migratory birds. *Cf. Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000).

iv. Congress has made no findings regarding the impact, if any, that the extension of Clean Water Act jurisdiction to intrastate waters that may temporarily be visited by migratory birds would have on interstate commerce. Indeed, because the migratory bird rule is an administrative interpretation rather than a statute, the deference this Court ordinarily gives Congress regarding the scope of the commerce power is not warranted in this case. The constitutionality of the Corps' interpretation of its own jurisdiction under the Act is a question

for this Court, not the political branches. *Morrison*, 120 S. Ct. at 1753 & n.7.

2. The migratory bird rule offends basic notions of federalism. *See Morrison*, 120 S. Ct. at 1754 ("The Constitution requires a distinction between what is truly national and what is truly local"). The activity that the Corps seeks to regulate has historically been the province of the States.

a. The regulation of land use activities has traditionally been entrusted to the States and their political subdivisions. *See, e.g., Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The Corps' migratory bird rule would usurp the police power over such activities.

b. Moreover, the regulation of wild animals is a traditional area of state concern. *Geer* v. *Connecticut*, 161 U.S. 519 (1896). Although this Court has said that there is also a national interest in protecting migratory bird habitats, it has not done so in the context of the Commerce Clause. Rather, the Court has said that this interest may support the acquisition and regulation of land by the federal government pursuant to the *property* power (*North Dakota* v. *United States*, 460 U.S. 300 (1983)), and the enactment, pursuant to the *treaty* power, of federal statutes to enforce international treaties to protect migratory bird populations (*Missouri* v. *Holland*, 252 U.S. 416 (1920)). Those cases, which construed other powers conferred on the government under the Constitution, did *not* hold that the *commerce* power encompasses wild animal regulation. On the contrary, the migratory bird rule exceeds the enumerated powers of the federal government.

ARGUMENT

While Congress's powers under the Commerce Clause are indisputably expansive, even defenders of the Corps of Engineers' so-called migratory bird rule acknowledge that the assertion of federal jurisdiction over every puddle or birdbath on which migratory waterfowl may temporarily alight "tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1396 (9th Cir.), *cert. denied sub nom. Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995). *Amici* submit that the migratory bird rule clearly exceeds the federal authority to regulate interstate commerce conferred by the Constitution. As a result, the Corps' assertion, in sole reliance on that rule, of regulatory jurisdiction over petitioner's property should be invalidated as unconstitutional.

1. It is undisputed that the Commerce Clause issue in this case must be resolved under the framework articulated by this Court in *United States* v. *Lopez*, 514 U.S. 549 (1995), and reiterated last Term in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000). As those cases make clear, the congressional power to regulate interstate commerce necessarily includes "judicially enforceable outer limits." *Lopez*, 514 U.S. at 566; *see also Morrison*, 120 S. Ct. at 1748 ("even under [this Court's] modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds"). Enforcement of those limits is necessary to ensure that our federal government acts only within the sphere of enumerated powers conferred on it by the Constitution.

The Court explained in *Lopez* that precedent establishes "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. at 558.

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted); *see also Morrison*, 120 S. Ct. at 1749. The migratory bird rule at issue in this case is not a permissible exercise of federal authority under any of those categories.

a. The migratory bird rule does not regulate the "channels of interstate commerce." To be sure, some *navigable* waters of the United States are, literally, channels of commerce among the States, and are therefore subject to federal regulation. *See, e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). And Congress may regulate commercial activity relating to some animals (fish, for example) that occupy such waters. *Cf. Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977). The Corps' migratory bird rule, however, cannot be sustained on this rationale.

In a series of decisions, this Court has "define[d] the scope of Congress' regulatory authority under the Inter-

state Commerce Clause" over navigable waters. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citing *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *South Carolina* v. *Georgia*, 93 U.S. 4 (1876); *The Montello*, 87 U.S. (20 Wall.) 430 (1874); and *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871)). Under even the most lenient of those definitions, however, the isolated ponds and ditches on petitioner's property cannot constitute "navigable waters" within this Court's Commerce Clause jurisprudence. *See Appalachian Power*, 311 U.S. at 426-27. They certainly do not comprise part of the "highway for commerce between ports and places in different States" (*Ex parte Boyer*, 109 U.S. 629, 632 (1884)) that justifies the exercise of federal power. *See* Gov't C.A. Br. 23 n.13 ("Paragraph (a)(3) waters . . . are, by definition, neither part of a tributary system to navigable or interstate waters nor 'adjacent' to such waters or their tributaries").

The Court made clear in *Kaiser Aetna* that, if a regulation does not affect "navigable waters" as defined by the Court's precedents, then "traditional Commerce Clause analysis" should be employed in evaluating whether a particular regulation is within the commerce power. *See* 444 U.S. at 173-74. In particular, in cases such as this one that do not involve navigable waters, the inquiry becomes whether the regulated activity substantially affects commerce (*i.e.*, the third mode of analysis identified in *Lopez*). *Ibid.*[3]

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[3] The Court need not reach the "substantial effects" test in this case. Under the plain language of the Clean Water Act, the Corps' jurisdiction is limited to "navigable waters," defined only as "the waters of the United States." In construing the scope of this statu-

[Footnote continued on next page]

b. The migratory bird rule is not a regulation of the "instrumentalities of commerce." That is because *ferae naturae*, such as free-ranging migratory birds, are the property of no one. *See Seacoast Products*, 431 U.S. at 284 ("[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."). As a result, at least as long as the birds continue to migrate freely, they do not amount to articles of commerce and cannot be the subject of commercial transactions.

[Footnote continued from previous page]
tory jurisdiction, this Court has previously declined to "address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985). Answering that question in the negative would mean that the Corps' migratory bird rule, at least as applied in this case, is not authorized by the statute. *See United States* v. *Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least . . . closely related to navigable or interstate waters"). Such a construction would not only comport with common sense, but also would render consideration of the Commerce Clause issue unnecessary. *Cf. Jones* v. *United States*, 120 S. Ct. 1904, 1911-12 (2000) (construing federal arson statute narrowly to avoid Commerce Clause difficulties posed by broader interpretation urged by the government). *Amici* address the constitutional issue in the event the Court disagrees with petitioner's submission that the statutory reach of the Clean Water Act does not extend to isolated ponds unconnected to any navigable or interstate waterways.

Once reduced to possession through seizure or capture, wild animals could well be "things in interstate commerce" the sale or transportation of which may be subject to regulation under the commerce power. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). This rationale explains, for example, the Court's observation (quoted, out of context, by the Solicitor General) that the "'assumption that the national commerce power does not reach migratory wildlife is clearly flawed.'" Opp. to Pet. for Cert. 18 (quoting *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979)). In the quoted case, the Court was considering the Secretary of the Interior's authority, pursuant to the Bald Eagle Protection Act, "to bar *commercial transactions* in covered bird parts." *Allard*, 444 U.S. at 63 (emphasis added). But that rationale has no applicability to the Corps' efforts to regulate private property simply because it may be *visited* by migratory birds, because no commercial transactions are involved.

c. Thus, as the Solicitor General appears to acknowledge (*see* Opp. to Pet. for Cert. 17), the migratory bird rule can be upheld, if at all, only upon a finding that it constitutes a regulation of activities that, although wholly intrastate, have a substantial effect on interstate commerce. *See* Pet. App. 6a ("the migratory bird rule" can "only [be] sustained as an exercise of the third variety of regulatory power"). But the Corps' attempt to extend its jurisdiction to petitioner's property cannot be upheld on this ground either.

As the Court explained last Term, *Lopez* "provides the proper framework" for analyzing whether a federal law properly regulates activity that substantially affects interstate commerce. *Morrison*, 120 S. Ct. at 1749. That framework sets forth four separate areas of inquiry:

(i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the link between the regulated activity and interstate commerce is direct or attenuated; (iii) whether the regulation includes an express jurisdictional element; and (iv) whether Congress has made findings regarding the regulated activity's effect on interstate commerce. *See id.* at 1749-51. As in *Lopez* and *Morrison*, each of those factors indicates that the migratory bird rule at issue in this case exceeds the authority granted to the federal government under the Commerce Clause.

i. As discussed above, the migratory bird rule is not aimed at commercial or economic activity. As a result, the linchpin of the court of appeals' Commerce Clause analysis cannot bear the weight the court sought to put on it. The court below said that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a (citing, *inter alia*, *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). The court thus implicitly recognized that the Corps' application of the migratory bird rule in this particular case could *not* be justified as substantially affecting commerce, but had to be "aggregated" with other such regulation in order to satisfy the substantial effects test.

The court of appeals failed to acknowledge, however, that "in every case where [this Court has] sustained federal regulation under *Wickard*'s aggregation principle, *the regulated activity was of an apparent commercial character*." *Morrison*, 120 S. Ct. at 1750 n.4 (emphasis added); *see Lopez*, 514 U.S. at 559-60 (prerequisite to applying aggregation analysis is determination that federal law regulates "intrastate *economic activity*") (emphasis added). Indeed, the Court recently stressed that "thus far in our Nation's history [the Court's] cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751 (emphasis added).

Thus, in *Lopez*, the Court found that since federal regulation of gun possession is not "an essential part of a larger regulation of *economic* activity," the law at issue could not be sustained under precedents, such as *Wickard*, "upholding regulation of [intrastate] activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561 (emphases added). Similarly, in *Morrison*, the aggregation principle was inapplicable because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 120 S. Ct. at 1751. So, too, here.

The court of appeals did not even undertake to inquire, much less make a determination, whether the Corps' migratory bird rule is either directed at economic activity or part of a larger scheme of economic regulation. And plainly it is not. Like the gun possession statute at issue in *Lopez* and civil remedy provision of the Violence Against Women Act invalidated in *Morrison*, the focus of the Corps' regulation–the actual or potential presence, however fleeting, of uncaptured migratory birds on private property–is not economic or commercial activity. *See Gibbs*, 2000 WL 726073, at *24-25 (Luttig, J., dissenting). Neither the presence of the wild

animals, nor regulation of aquatic property on which they might land, can be considered "in any sense of the phrase, economic activity." *Morrison*, 120 S. Ct. at 1751.

In the absence of commercial transactions or economic activity, the "aggregation" analysis exemplified by *Wickard* is simply inapplicable. Rather, in circumstances such as these, "[t]he point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power." *Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari). Because there is absolutely no indication that the effect on migratory bird populations of petitioner's proposed use of its land would itself affect interstate commerce, the Corps' attempt to regulate that activity exceeds the scope of the federal commerce power.

ii. The court of appeals' contrary conclusion, that the filling of isolated ponds could have a substantial effect on commerce, gives new meaning to the term "attenuated." From the premise that many Americans spend money engaging in bird-related activities such as hunting and birdwatching, and that some of them cross state lines to do so, the court below deduced that the filling of man-made depressions on a few acres of petitioner's property could have an effect on interstate commerce. Pet. App. 7a. This is precisely the type of reasoning condemned by the Court in *Lopez*: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the

Commerce Clause to a general police power of the sort retained by the States." 514 U.S. at 567.

As in *Lopez* and *Morrison*, the Corps' attenuated chain of reasoning to reach an impact on interstate commerce would leave nothing that the federal government could *not* regulate. For example, tourists travel to New England each fall to view the turning leaves; under the Corps' theory, the federal government could therefore regulate every tree. Similarly, people regularly travel to shoot, fish, trap, observe and photograph game throughout the Nation; under the Corps' theory, the federal government could regulate not only the animals themselves, but also whatever natural (or unnatural) environments, irrespective of private ownership, the creatures great and small call home.

Under the Corps' view of the commerce power, therefore, each parcel of land, every ditch and puddle, the blades of grass and the soughing wind–verily, all aspects of nature that might draw the interest of some part of the citizenry–would be subject to control by the federal government. As Judge Sentelle has rightly observed, theories such as those put forth by the Corps in this case have "no logical stopping point." *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (dissenting opinion), *cert. denied*, 524 U.S. 937 (1998). The federal government would be able to exert a police power over the Nation's lands and waters, and the birds, beasts and fishes that inhabit them, no less sweeping than the generalized power to combat crime asserted in *Lopez* and *Morrison*. But, as the Court said in rebuffing the government's insistence in those cases that the commerce power has virtually no limits, "[w]e *always* have rejected readings of the Commerce

Clause and the scope of federal power that would permit Congress to exercise a police power." *Morrison*, 120 S. Ct. at 1754 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)). The Court should do so here as well.

iii. The migratory bird rule contains no "jurisdictional element" to ensure that the requisite nexus with interstate commerce is present. *See Lopez*, 514 U.S. at 561-62. Although the Corps concluded that the aquatic areas of petitioner's property "'are or could be used as habitat by migratory birds which cross state lines'" (Pet. App. 4a), the nexus requirement can be met only by the interstate transportation of the instrumentalities or things of commerce. *See, e.g., United States* v. *Bass*, 404 U.S. 336, 347-49 (1971).

Since wild animals are not themselves in interstate commerce, their crossing of state boundaries (even if established) cannot provide the nexus to commerce that the Court's cases require. *See Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari) ("the self-propelled flight of birds across state lines" does not create "a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds"). It is a truism that birds fly. But the mere fact that their path of flight may cross a state line, without constituting or impacting commercial activity, does not trigger the commerce power.

A contrary conclusion would mean that the federal government could regulate literally every body of standing water, both permanent and transitory, that might be visited, however fleetingly, by migratory birds. *Cf. Jones*, 120 S. Ct. at 1911 ("Were we to adopt the Government's expansive interpretation of [the arson statute], hardly a building in the land would fall outside the federal statute's domain"); *Lopez*, 514 U.S. at 564 ("if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Acceptance of the Corps' expansive view of its own jurisdiction would eviscerate the very doctrine of enumerated powers by authorizing the federal government to regulate all manner of wholly intrastate property. Congress could thereby subject landowners to one-size-fits-all federal rules, rather than the varied state schemes that have traditionally governed the use of real property. *Cf. Lopez*, 514 U.S. at 580-83 (Kennedy, J., concurring).

The court of appeals attempted to avoid this obvious conclusion by asserting that the Corps "must first make a factual determination that a particular body of water provides a habitat for migratory birds." Pet. App. 8a. That construction is inconsistent with the plain terms of the migratory bird rule, which purports to give the Corps "*carte blanche* authority to regulate every property that migratory birds use or could use as habitat." *Cargill*, 516 U.S. at 955 (Thomas, J., dissenting from denial of certiorari); *see* 51 Fed. Reg. at 41,217 (asserting federal jurisdiction over waters that "are *or would be* used as habitat by birds") (emphasis added). In any event, the definition of "habitat" is so broad as to add no limitation whatsoever to the assertion of federal jurisdiction over waters that may be used, even temporarily, by any of the billions of migratory birds that make use of the Nation's flyways. *See, e.g., Rueth* v. *EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland

affects interstate commerce is whether migratory birds *use* the wetland") (emphasis added). The "use" of an isolated body of water by a migratory bird is simply an insufficient nexus to interstate commerce to support the exercise of federal authority.

iv. As in *Lopez*, "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." 514 U.S. at 563. In particular, Congress has *never* sought to explain how the extension of the Corps' Section 404 permitting authority over isolated waters that are or could be used by migratory birds substantially affects interstate commerce.

Indeed, because the "migratory bird rule" is an administrative interpretation of the Clean Water Act, there has been *no* "legislative judgment" regarding the effect on commerce, if any, of the activity in question. Unlike the statutes at issue in *Lopez* and *Morrison*, the decision to extend federal authority to intrastate activities was not made by the People's elected representatives, but rather by bureaucrats. Thus, while "[d]ue respect for the decisions of a coordinate branch of Government demands that [this Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds" (*Morrison*, 120 S. Ct. at 1748), this Court need not declare any act of Congress invalid if it determines that the Corps has adopted an overly aggressive interpretation of its jurisdiction under the Clean Water Act. Rather, the Court need only decide that the Corps, in the preamble to its interpretive

regulations, went too far in defining the scope of its own regulatory jurisdiction.

The Solicitor General puts much weight on the Conference Committee's statement that "'[t]he conferees fully intend that the term 'navigable waters' [in the CWA] be given the broadest possible constitutional interpretation . . . .'" Opp. to Pet. for Cert. 15 (quoting S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972)). But aside from the obvious fact that "legislative intention, without more, is not legislation" (*Train* v. *City of New York*, 420 U.S. 35, 45 (1975)), the conferees' observation begs the question of whether the Corps' interpretation of the term in the migratory bird rule is constitutional. *That* is ultimately a question for this Court, not a congressional committee or an administrative agency, to decide. *See, e.g., Morrison*, 120 S. Ct. at 1753 n.7 ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text").

2. In addition to failing the Commerce Clause analysis articulated in *Lopez* and *Morrison*, the Corps' migratory bird rule offends basic notions of federalism. As the Court explained last Term, "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 566, 568. The activities that the Corps seeks to regulate–land use and wildlife–have traditionally been matters of state concern.

a. The regulation of local land use activities has long been the province of the States and their political subdivisions. *See, e.g., Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994); *Village of Belle Terre* v. *Boraas*, 416

U.S. 1, 13 (1974); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In fact, the Court has specifically recognized that "a State's power to regulate the use of water . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power." *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). The Corps is attempting to usurp that "police power" through the implementation of its migratory bird rule.

The court of appeals attempted to dismiss the concern that the Corps was intruding on matters of state sovereignty, but its reasoning was entirely circular: "[B]ecause the regulation of migratory bird habitat is a permissible exercise of Congress' authority, the Supremacy Clause . . . squarely supports the legitimacy of giving precedence to federal law in this area." Pet. App. 9a. As discussed above, the regulation of isolated, intrastate waters solely because they might be visited by migratory birds is *not* a "permissible exercise" of federal authority. At the very least, the question is, indisputably, a close one. *See Leslie Salt*, 55 F.3d at 1396. In these circumstances, deference to traditional state autonomy is appropriate. *Cf. New York* v. *United States*, 505 U.S. 144, 156-57 (1992).

b. States have also long asserted authority over the wild birds, animals and fishes within their borders. As the Court has explained, this is an incidence of sovereignty that has been exercised since at least Roman times. *Geer* v. *Connecticut*, 161 U.S. 519, 522-28 (1896); *see also Seacoast Products*, 431 U.S. at 287-88 (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). This authority is exercised in a variety of ways,

including the establishment of hunting seasons, the various schemes of fishing and other licenses required, limitations on the size and number of animals that can be caught, and the like. *See, e.g., Baldwin* v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978).

Although the Court has held that the States cannot enforce regulation that discriminates against interstate commerce in game *after* it has been reduced to possession, and therefore becomes an article of commerce (*Hughes*, 441 U.S. 322), the Court has never cast doubt on the traditional authority of the States to regulate the activities of people in relation to animals in the wild. Nor has the Court ever suggested that the federal government has the authority to (for example) limit the deer-hunting season in Virginia or require permits for fishing in Alaska's intrastate waters.

The court of appeals said that the contention that federal regulation of migratory birds intrudes on an area of traditional state sovereignty "is refuted by the numerous international treaties and conventions designed to protect migratory birds [citations], as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds, *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983); *see also Missouri* v. *Holland*, 252 U.S. 416 (1920)." Pet. App. 8a. The court missed the point.

In commenting on the national interest in migratory birds, the Court in *North Dakota* v. *United States* was construing a statute that authorized the federal government to acquire, by purchase, land that might be used as bird habitats. *See* 460 U.S. at 309-10. The power of eminent domain is undoubtedly an attribute of national sovereignty, and the federal government, if it so

chooses, may exercise that power for any lawful purpose, including migratory bird preservation. *See id.* at 310 ("the United States unquestionably has the power to acquire wetlands for waterfowl production areas, by purchase or condemnation, without state consent"). And, of course, once the government has acquired property it may thereafter exercise its plenary jurisdiction over it. *See Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

But the federal government's regulation, pursuant to the property power, of wild animals on its *own* lands says nothing about whether the federal government can regulate, pursuant to the commerce power, man-made ponds on *private* property based only on the actual or potential presence of migratory birds. Certainly, neither *North Dakota* v. *United States* nor any other decision of this Court has concluded, under the "substantial effects" test, that the Commerce Clause authorizes such federal regulation.

The Court's decision in *Missouri* v. *Holland*, which sustained the constitutionality of the Migratory Bird Treaty Act, likewise did not suggest, much less hold, that the Commerce Clause authorizes the federal government to regulate wild animals. In fact, the Solicitor General had argued in that case that "[a] migratory bird law of this kind is sustained, apart from treaty, . . . by the power to regulate commerce between the States." 252 U.S. at 423 (summarizing argument for the United States). The Court implicitly rejected that argument, holding instead that the statute could be sustained, if at all, only as an exercise of the *treaty* power. *Id.* at 433-34. That power is not implicated in this case.

The Court's decision in *Missouri* v. *Holland* makes clear that the regulation of migratory birds is *not* within Congress' enumerated powers, including the commerce power. *See id.* at 433 ("there may be matters . . . that an act of Congress could not deal with but that a treaty followed by such an act could"). In other words, *Missouri* v. *Holland* "thus views the treaty power as a delegation of authority to federal treaty-makers independent of the delegations embodied in the Constitution's enumeration of powers entrusted to Congress." Tribe, *American Constitutional Law* 646 (4th ed. 2000). It is a necessary corollary of the Court's holding that the subject of the treaty and its implementing statute (*i.e.*, migratory birds) is "exclusively within the ambit of the states with respect to domestic legislation, but not with respect to international agreements–and laws enacted by Congress pursuant thereto." *Ibid.*

Thus, neither *Missouri* v. *Holland*, nor the several treaties cited by the court of appeals, lends support to the Corps' argument that the regulation of migratory birds is within the commerce power. On the contrary, the reasoning of *Missouri* v. *Holland* dictates the conclusion that where, as here, such a treaty has *not* been enacted, the regulation of wild animals remains a matter of state concern that is outside the enumerated powers conferred on Congress. And because "[e]very law enacted by Congress *must* be based on one or more of its powers enumerated in the Constitution" (*Morrison*, 120 S. Ct. at 1748 (emphasis added)), the migratory bird rule cannot be sustained as a valid exercise of federal authority. *See Lopez*, 514 U.S. at 567-68.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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3 pp

QUESTION PRESENTED

Whether the court below was required under the Chevron doctrine to defer to the Corps' interpretation of its authority to regulate wildlife habitat under the Federal Water Pollution Control Act of 1972 ("Clean Water Act"), when Congress has evidenced no intent to grant the Corps such authority under other wildlife protection statutes and has instead granted such authority to other agencies?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioner.[1] Both parties and the intervenor have consented to the filing of this brief. Those letters of consent have been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

This case involves an assertion of regulatory jurisdiction by the U.S. Army Corps of Engineers ("Corps") under Section 404 of the Federal Water Pollution Control Act ("Clean Water Act") over 17.6 acres of privately owned land.

In 1987, the Corps originally concluded that it had no regulatory jurisdiction over the 17.6 acres of isolated wetland at issue in this case because the wetland did not meet the regulatory "definition of a wetland or lakes" or the broader definition of "'waters of the United States.'" Petitioner's Appendix ("Pet. App.") at 3a-14a, 16a. Later that same year, however, the Corps reversed its position and asserted that it did in fact have jurisdiction over the 17.6 acres because the land was or could be "habitat" for migratory birds. Pet. App. at 4a, 16a. Accordingly, pursuant to Section 404 of the Clean Water Act, the Corps denied petitioner's wetland permit application. *Id.*

The Corps' assertion of jurisdiction over the 17.6 acres of land in this case is not based on an express statutory grant of authority for the Corps to regulate wildlife habitat in non-navigable waters, nor upon an independent analysis of the Clean Water Act by the court below, but solely upon the

agency's interpretation of its own jurisdiction, to which the court below deferred. Pet. App. at 4a-13a.

Specifically, the court below held that it was required by the Chevron doctrine, set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), to defer to the Corps' interpretation of its jurisdiction under the Section 404 permitting program of the Clean Water Act. Pet. App. at 9a.

SUMMARY OF ARGUMENT

In determining whether or not Congress had in fact delegated regulatory authority over non-navigable migratory bird habitat to the Corps, the court below held that it was required to "review [the Corps'] interpretation of a statute it is charged with administering under the standard outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Pet. App. at 9a. The Chevron doctrine states that a court must defer to a reasonable

interpretation of an ambiguous statute offered by the agency charged with administering the statute. *Chevron*, 467 U.S. at 844-45. This doctrine rests in part on the practical premise that agencies have superior technical expertise upon which Congress is entitled to call upon in the enactment of statutes that delegate to these expert agencies the role of fleshing out the details of the regulatory scheme through regulations. However, as this Court has noted, the constitutional heart of *Chevron* consists of appropriate judicial deference to legislative enactments (including delegation of some policy-making to the executive branch) which underlies the separation of powers doctrine:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While

> agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities. . . . The responsibilities for assessing the wisdom of such policy choices are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 865-66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

This Court has never held, however, that the legal determination of what power Congress has delegated to an agency (and what regulatory power Congress has withheld) turns on the agency's policy determinations, rather than the traditional rules of statutory construction employed by the courts. To the contrary, last term, this Court held that although judicial deference is appropriate to an agency's statutory interpretation, the reviewing court must

nevertheless assure that the agency's interpretation is not "'inconsistent with the administrative structure that Congress enacted into law.'" *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). This Court further held:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or--ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic

> and political magnitude to an administrative agency.

Id. at 1300-01 (citations omitted).

In the present case, the court below ignored these established canons of statutory construction, effectively converting the task of determining the outer limits of Corps jurisdiction from one of statutory construction into a policy matter to be decided by the Corps itself. By deferring to the agency's policy determination as to its jurisdiction under the Clean Water Act, or the migratory bird rule which provides that the Corps can require a dredge and fill permit for isolated wetlands if the Corps believes that such wetlands are or could be habitat for migratory birds, the court below allowed the agency to define for itself the regulatory authority that Congress *should* have granted it as a policy matter, and not the legal question of whether Congress had, in fact, delegated such authority to the Corps.

In consequence, the court below completely ignored the fact that Congress has developed an entirely separate scheme for migratory bird protection: the Migratory Bird Treaty and the Migratory Bird Treaty Act of 1918, the treaty's implementing statute. 16 U.S.C.A. §§ 703-712 (West 1985 & Supp. 2000). Moreover, Congress has established special protections for particular species, e.g., the Bald and Golden Eagle Protection Act, 16 U.S.C.A. §§ 668-668d, and generally for threatened and endangered species, the Endangered Species Act, 16 U.S.C.A. §§ 1531-1544. Congress has also created refuges, national seashores, wilderness areas, national parks, national marine sanctuaries and other specific designations that are designed to provide habitat for migratory birds and wildlife. *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C.A. §§ 1-18f-3; Refuge Recreation Act of 1962, 16 U.S.C.A. §§ 460k-460k-4; Wilderness Act of 1964, 16 U.S.C.A. §§ 1131-1136; National Wildlife Refuge System Administration Act of

1966, 16 U.S.C.A. §§ 668dd-668ee; Fish and Wildlife Conservation Act of 1980, 16 U.S.C.A. §§ 2901-2912; National Marine Sanctuaries Act, 16 U.S.C.A. §§ 1431-1445b.

In this entire scheme, the Army Corps of Engineers has no role, except to follow the dictates of those lead agencies to which Congress has, in fact, delegated such authority. *See Bennett v. Spear*, 520 U.S. 154, 154 (1997) (noting Corps must seek biological opinion from Fish and Wildlife Service under Section 7 of the Endangered Species Act when proposed potentially affects certain wildlife). Indeed, had Congress wanted to give the Corps authority over wildlife habitat protection under any of these statutes, or to implicate the Corps' permitting authority under Section 404 of the Clean Water Act, there is no reason why it could not have done so.

In short, under the regulatory scheme adopted by Congress, there is nothing to even suggest that Congress ever

intended that the Corps exercise the Clean Water Act's Section 404 permitting authority over isolated wetlands solely because of the presence of migratory birds. The court below's decision to defer to the agency's policy determination regarding its own jurisdiction not only fails to take into account Congress' overall administrative scheme with respect to the Clean Water Act and numerous wildlife protection statutes, but also runs afoul of the inherent limitation of the Chevron doctrine – separation of powers. Since Congress evidently did not intend to delegate wildlife habitat protection authority to the Corps, the Corps' usurpation of that authority for itself turns on its head the very notion of separation of powers.

ARGUMENT

I. JUDICIAL DEFERENCE TO THE CORPS' MIGRATORY BIRD RULE CONFLICTS WITH THE SEPARATION OF POWERS DOCTRINE.

The migratory bird rule began life as an example

contained in the preamble to a regulation interpreting the Corps' jurisdictional authority under the Clean Water Act. *See* 33 C.F.R. § 328.3(a)(3) (2000); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 42,217 (1986). The proposed regulation, but not the preamble, was published for notice and comment. 51 Fed. Reg. 41,206. When the final rule was published, the Corps included in the preamble several examples of how the regulation might be applied by the Corps. 51 Fed. Reg. at 41,217. One of those examples, now known as the migratory bird rule, states that the Corps may assert jurisdiction over an isolated wetland if the wetland is or could be habitat for migratory birds. *Id.*

The court below held that it was required to defer to the migratory bird rule because even though it was not published for notice and comment, the Chevron doctrine requires "the court [to] defer to the agency interpretation so long as it is based on a reasonable reading of the statute."

Pet. App. at 9a, 11a-12a. In point of fact, however, *Chevron* does not hold that a reviewing court must turn a "blind eye" to any interpretation of its jurisdictional authority so long as the court can conclude it is "reasonable."

Indeed, subsequent decisions make it clear that even when deferring, the reviewing court must take steps to ensure that the agency's construction of a statute it is charged with enforcing is "reasonable, in light of the language, policies, and legislative history of the Act . . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (examining statutory language, policies, and legislative history of the Clean Water Act to determine whether Congress intended for the Corps to exercise jurisdiction over adjacent wetlands); *see also Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) (examining Congress' overall regulatory scheme in determining whether FDA had authority under the Food, Drug, and Cosmetic Act to regulate tobacco products).

Moreover, the rule of judicial deference to agency interpretation of a statute has no application where the issue before the court is: What authority did Congress delegate to the agency in the first instance? Neither of the two rationales set forth in *Chevron* (agency expertise and Congressional intent to delegate the power to implement a statute and make policy choices through regulation) applies when the court, as here, is required to define the extent of the agency's authority under a statute such as the Clean Water Act. *Chevron*, 467 U.S. at 842-45, 865-66.

First, the Corps of Engineers has no particular expertise in determining the nature and extent of the authority of Congress granted to it under Section 404 or, for that matter, under any other statute authorizing Corps' activities. To the contrary, it is the court that possesses both the expertise and the constitutional duty of interpreting the nature and extent of the power granted by Congress to an agency such as the Corps, and what power has not been so

granted is therefore reserved to the States or the people themselves, respectively, under the Tenth Amendment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); U.S. CONST. amend. X.

Second, Congress cannot have intended to delegate to the Corps the power to define its own authority under Section 404 of the Clean Water Act, for this would amount to delegate of legislative authority without any of the necessary standards or limitations. *See, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 371-74 (1989); *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted Browner v. American Trucking Ass'n, Inc.*, 120 S. Ct. 2003 (2000) *and American Trucking Ass'n, Inc. v. Browner*, 120 S. Ct. 2193 (2000). The extent of the permitting authority delegated to the Corps by the Clean Water Act – i.e., over the permitting of dredge or fill material

into navigable waters at specified disposal sites – does not and could not, consistent with separation of powers, include the authority to append "and migratory bird habitat" to that statutory authorization. *See* 33 U.S.C. § 1344 (West 1986 & Supp. 2000). Congress, in Section 404, gave the Corps regulatory power over certain activities – no more and no less – and no interpretation or regulation can augment that statutory authority.

Indeed, it may fairly be said that the sole measure of the lawfulness of a regulation is whether it falls within or without the power given that agency by Congress. *See United States ex rel. O'Keefe v. McDonnel Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside.") (citing 5 U.S.C. § 706(2)(C) (1994)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (regulations must be

struck down unless reviewing court is "reasonably [ ] able to conclude that the grant of authority contemplates the regulations issued."); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them.").

Thus, it is the role of the court in the first instance to determine the nature and extent of regulatory authority granted to an agency by Congress. When, as here, the court withholds it own legal analysis of the statute and defers to the agency's determination as to its own statutory authority, it becomes the agency and not the court that exercises the quintessentially judicial power of declaring what the law is.

The court below thus erred by allowing the Corps of Engineers to determine the extent of its own authority by "deferring" to the Corps' policy determination that the term "navigable waters" includes protection of "migratory bird habitat" on non-navigable wetland.

II. JUDICIAL DEFERENCE TO THE CORPS' MIGRATORY BIRD RULE CONFLICTS WITH CONGRESS' ADMINSTRATIVE STRUCTURE FOR WILDLIFE PROTECTION, WHICH DOES NOT GRANT ANY ENFORCEMENT AUTHORITY TO THE CORPS.

Under the regulatory scheme Congress has developed for migratory bird protection, the Corps is at best a bit player. Of the several comprehensive wildlife protection statutes Congress has enacted, the Corps has not only been denied a primary administrative role, but, in fact, has been required by Congress to first consult with other federal agencies before taking any action that may affect certain wildlife. *See, e.g.*, 16 U.S.C.A. § 1536 (West 1985 & Supp. 2000) (under the Endangered Species Act, requiring Corps to consult with the Fish and Wildlife Service ("FWS")); 16 U.S.C.A. § 662 (under the Fish and Wildlife Coordination Act, requiring Corps to consult with FWS); 16 U.S.C.A. § 1456 (under the Coastal Zone Management Act, requiring Corps to consult with the National Oceanic and Atmospheric Administration

(under the Department of Commerce)); *see also* 33 C.F.R. § 320.4 (2000); 50 C.F.R. pt. 402 (2000).

The U.S. Fish and Wildlife Service (as part of the Department of Interior) is the lead enforcement agency over the Migratory Bird Treaty and the Migratory Bird Treaty Act passed to implement it. 16 U.S.C.A. § 704. Likewise, the Fish and Wildlife Service (again, as part of the Department of Interior) is the lead agency Congress has designated to enforce special protections for particular species, e.g., the Bald and Golden Eagle Protection Act, 16 U.S.C.A. § 668b, and generally for threatened and endangered species, the Endangered Species Act, 16 U.S.C.A. § 1533.

The Department of Interior (U.S. Fish and Wildlife Service and Bureau of Land Management) and the National Oceanic and Atmospheric Administration ("NOAA") (under the Department of Commerce) administer national refuges, national seashores, wilderness areas, national marine sanctuaries, and national parks that Congress has designated

to provide habitat for migratory birds and wildlife. *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C.A. § 1a-2; Refuge Recreation Act of 1962, 16 U.S.C.A. § 460k; Wilderness Act of 1964, 16 U.S.C.A. § 1132; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C.A. §§ 668dd-668ee; Fish and Wildlife Conservation Act of 1980, 16 U.S.C.A. §§ 2902, 2904; National Marine Sanctuaries Act, 16 U.S.C.A. §§ 1432-33, 1437.

In this entire scheme, the Army Corps of Engineers has no role, except to follow the dictates of those lead agencies to which Congress has, in fact delegated such authority. *See Bennett v. Spear,* 520 U.S. 154, 154 (1997) (noting Corps must seek biological opinion from Fish and Wildlife Service under Section 7 of the Endangered Species Act when proposed potentially affects certain wildlife); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 607 (3d Cir. 1974) ("It is clear that Congress intended that the Army Corps of Engineers and the Secretary of the Army would

consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation. The federal environmental protection statutes did not, however, by their terms enlarge the jurisdiction of the Army Corps of Engineers . . .").

Likewise, there is nothing in the Clean Water Act that suggests that Congress wanted to give the Corps authority over wildlife habitat protection under any of these statutes, or to implicate the Corps' permitting authority under Section 404 of the Clean Water Act. In 1972, Congress substantially amended the Federal Water Pollution Control Act, commonly known as the "Clean Water Act," by establishing for the first time a comprehensive program of regulations and permits to control water pollution. Pub. L. No. 92-500, 86 Stat. 816 (1972). The statute forbids "the discharge of any pollutant by any person" except in accordance with a statutory scheme which requires a permit for most "point source" pollutant discharges into "navigable waters." 33 U.S.C.A. §§ 1311(a),

1362(12). Congress has charged EPA with lead responsibility of eliminating all water pollution discharges by 1985. 33 U.S.C.A. § 1251(a), (d).

The role of the Corps under the Clean Water Act is a narrow one: to issue permits for the discharge of a very specific pollutant (dredge and fill material) at specific places (at specified disposal sites in navigable waters). Even this limited permitting authority is subject to EPA's review and veto of Corps-issued permits. 33 U.S.C.A. § 1344(c). It is thus EPA, and not the Corps, to which Congress delegated primary responsibility for administering the Clean Water Act. 33 U.S.C.A. § 1251(d); *see also* 43 Op. Att'y Gen. 15 (1979).

In practice, Section 404 dredge and fill permits may be issued by the Corps, after notice and comment. 33 U.S.C. § 1344(a). However, the substantive water protection criteria that permit applicants must meet are established in guidelines developed by EPA in conjunction with the Corps. 33 U.S.C.

§ 1344(b). EPA has also promulgated substantive regulations, binding on the Corps, regarding dredge and fill permits. 40 C.F.R. pt. 230 (2000).

Ironically, in determining that the Corps' migratory bird rule was consistent with the Clean Water Act, the trial court in this case cited to the fact that EPA is the agency granted authority under the statute to promulgate regulations in order to protect fish and wildlife. Pet. App. at 29a (quoting 33 U.S.C. § 1343(c)(1)). There is nothing in the Clean Water Act cited by either court below that authorizes the Corps to issue Section 404 permits in order to protect migratory birds or any other kind of wildlife.

Finally, in 1985, this Court held in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), that Congress had granted the Corps authority under the Clean Water Act to exercise its Section 404 permitting authority over wetlands adjacent to navigable waters as was necessary to protect water quality. *Id.* at 133. The *Riverside Bayview*

Court concluded that adjacent wetland protection was consistent with Congress' concern over protecting entire aquatic ecosystems because adjacent "wetlands may affect the water quality of the adjacent lakes, rivers, and streams." *Id.* at 133-34. Applying that reasoning to the case at bar, there is nothing that implies that the Corps' jurisdiction under the Clean Water Act can be extended to non-adjacent wetlands for purposes of migratory bird habitat protection.

CONCLUSION

For all of these reasons, *amicus curiae* urges this Court to reverse the decision below.

Respectfully submitted,

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Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner,*
v.
UNITED STATES ARMY CORPS OF ENGINEERS, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).....26, 27

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U.S. Army Corps of Eng'rs Wetland Delineation Manual 36 (1987).....1

U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) 17, 22

U.S. Fish and Wildlife Serv., Wetlands of the United States Current Status and Recent Trends (1984) 18

U.S. Geological Survey, North American Breeding Bird Survey (visited July 25, 2000) http://www.mbr.nbs.govp/bbs/guild/group98.html 15

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The National Association of Home Builders ("NAHB") respectfully files this brief as amicus curiae in support of Petitioner, Solid Waste Agency of Northern Cook County ("SWANCC").[1]

INTEREST OF AMICUS CURIAE

NAHB represents 200,000 builders, land planners, land developers, and industrial developers. With approximately 850 affiliated state and local associations in all fifty states, NAHB is the most influential trade association representing the nation's housing industry. Because NAHB members are involved in numerous projects throughout the country, NAHB has substantial experience with federal regulation of waters of the United States and can provide the Court with additional insight into the issue at bar.

The "migratory bird rule" challenged in this case restricts the development potential of vast areas of land, so this Court's resolution of the issue presented is of great significance to NAHB and its members. The U.S. Army Corps of Engineers (the "Corps") interprets the Clean Water Act ("CWA") to cover a broad range of waters – from the territorial seas and major rivers to intermittent streams and tiny ponds, with no minimum size requirements. The Corps construes "navigable waters" to include water bodies in the traditional sense as well as wetlands, which include areas that do not even appear wet on the surface. U.S. Army Corps of Engineers Wetland Delineation Manual 36 (1987) (area may qualify as a wetland if saturated within 12 inches of the surface). Consequently, the "isolated waters" which the migratory bird rule purports to bring within federal control isolated water bodies as well as isolated wetlands. These isolated waters are ubiquitous. For example, a 1995 study by the

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[1] No counsel for either party authored this brief in whole or in part. No person or entity other than NAHB has made a monetary contribution to the preparation or submission of this brief.

Corps of isolated wetlands less than one-half acre in size indicates that approximately 8.3 million such wetlands averaging one-fourth of an acre are scattered across 1,836,469 acres of the United States - enough land to affect a multitude of citizens and local governments. The migratory bird rule subjects these depressions to federal regulation simply because they are or could be used by birds. In the absence of the migratory bird rule, these eight million low spots would fall under the sole jurisdiction of state and local governments. Application of the migratory bird rule is therefore of great consequence to any person or organization owning property that includes isolated wetlands or other isolated waters.

For home builders, the consequences of federal regulation of isolated waters are all too concrete. The presence of a federally regulated isolated water on a development parcel leaves a landowner in a Catch-22 situation: avoid the regulated area and leave it in its natural state (and thereby give up the right to develop what might otherwise be developable land), or obtain authorization in some form from the Corps to impact all or part of the area. Either course entails costs to the developer, costs that impact housing affordability.[2] Indeed, nearly ten years ago the Advisory Commission on Regulatory Barriers to Affordable Housing found that "environmental protection legislation and associated regulations dealing with wetlands often unnecessarily raise the cost of housing." Advisory Comm'n on Regulatory Barriers to Affordable Housing, "Not In My Back Yard": Removing Barriers to Affordable Housing

[2] A recent study found that the average cost of preparing a Section 404 permit application is $271,596, which does not include the significant additional costs such as those associated with mitigation and the carrying costs of the land during a lengthy permitting process that takes an average of 405 days. *See* David Sunding and David Zilblerman, Analysis of The Army Corps of Engineers' NWP Replacement Permit Proposal (2000).

(1991). Nearly ten years later, the regulatory hurdles created by the Section 404 permitting program have only gotten higher, resulting in ever increasing costs of compliance for landowners.[3]

SUMMARY OF ARGUMENT

At its core, this case concerns the authority of the federal government to control the use of land because it happens to include an isolated wet spot. It involves the same legal issue that went unresolved in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985): Whether Congress gave the Corps the authority to regulate as "navigable waters" isolated waters that are clearly not navigable and that have no hydrological connection to waters that are navigable. The case further presents the issue of whether assertion of jurisdiction over such isolated waters, if sanctioned by the CWA, is constitutionally permissible under the Commerce Clause where the only purported link between the isolated waters and interstate commerce is the area's use by migratory birds.

CWA Section 404 grants the Corps and the U.S. Environmental Protection Agency ("EPA") authority to regulate the discharge of dredged or fill material into navigable waters. The Corps and EPA by regulation have

[3] In fact, the Corps has substantially revised its nationwide permit program to make it more difficult for builders to obtain federal authorization to impact isolated waters. *See* 65 Fed. Reg. 12,818 (2000). Nationwide permits are general permits that are intended to provide a streamlined approval process for projects that would have minimal impacts on waters of the United States. Such permits have historically been widely used by home builders. Among other things, the Corps has eliminated Nationwide Permit 26, which authorized impacts of up to three acres of isolated wetlands and certain other waters of the United States for a single project, and replaced it with a new nationwide permit (No. 39) which limits impacts to only one-half acre of waters of the United States, a reduction of 84 percent in the acreage limit.

asserted jurisdiction over isolated waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1999); 40 C.F.R. § 230.3(s). In the present case, the Corps determined that it had jurisdiction over isolated waters on the property in question because of the so-called "migratory bird rule." Under the migratory bird rule, an isolated water (*e.g.*, a wetland or small pond lacking a hydrological connection to interstate waters) that is completely unrelated to commerce is deemed to have a sufficient effect on interstate commerce to trigger federal jurisdiction if the water is or would be used as habitat by migratory birds that cross state lines. 51 Fed. Reg. 41,206, 41,217 (1986). The Corps denied SWANCC's permit to fill the 17.6 acres in question after asserting jurisdiction over the property based on its finding that migratory birds used the isolated waters at the proposed site.

The Seventh Circuit's rationale in upholding the Corps' assertion of jurisdiction cannot be reconciled with the limits of Congress' Commerce Clause authority recognized by the Court in *United States v. Lopez* ("*Lopez*"), 514 U.S. 549 (1995), and *United States v. Morrison* ("*Morrison*"), 120 S. Ct. 1740 (2000). The Seventh Circuit found that the filling of isolated waters in the aggregate has resulted in a loss of habitat for migratory birds and, thus, in a decline in some bird populations. The court concluded, based on little more than surmise, that this has in turn led to diminished opportunities for activities such as bird watching and hunting, resulting in a substantial impact on interstate commerce. However, given that filling of isolated waters is not itself an economic activity, the court's reliance on the impacts of filling of isolated waters in the aggregate flies in the face of this Court's recent decision in *Morrison*. Moreover, the rationale employed by the Seventh Circuit, if allowed to stand, would effectively allow the federal government to regulate all use of land and would thoroughly federalize a quintessential state function.

Indeed, the Corps' assertion of jurisdiction must be scrutinized with particular care because land use is an

area of traditional state concern. The Corps' position is that simply because migratory birds use the property SWANCC intended to develop, the Corps could - and did - prohibit SWANCC from using it. This intrusion on the prerogatives of local governments to regulate land use in the best interests of the community is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment.

In addition, the Seventh Circuit was incorrect in holding that, in authorizing the regulation of "navigable waters" under the CWA, Congress intended to regulate isolated waters that are not remotely navigable. While Congress indicated an intent that the term "navigable waters" be read broadly, Congress never indicated that the qualifier "navigable" should be ignored entirely, as the Seventh Circuit has done. In light of the serious constitutional issues raised by a broader reading of "navigable waters," the Court should read the intended scope of CWA jurisdiction to exclude isolated waters having no connection with waters that are in fact navigable.

ARGUMENT

I. THE CORPS' ASSERTION OF JURISDICTION IS CONTRARY TO THE COURT'S HOLDINGS IN *LOPEZ* AND *MORRISON*

The Corps' claimed authority to regulate isolated waters through the migratory bird rule extends far beyond the bounds of the Commerce Clause and is contrary to the principles articulated by this Court in *Lopez* and affirmed in *Morrison*. Like the Gun-Free School Zones Act in *Lopez*, and the Violence Against Women Act in *Morrison*, the migratory bird rule is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to regulate an instrumentality of or thing in interstate commerce. Therefore, it can only be sustained if it regulates activities that substantially affect interstate commerce. *See Lopez*, 514 U.S. at 555-58; *Morrison*, 120 S.

Ct. at 1749. The activities being regulated here do not meet that test.

In its recent decision in *Morrison*, the Court reaffirmed that *Lopez* was not an aberration but in fact "provides the proper framework for conducting the required analysis" in a case such as this. 120 S. Ct. at 1749. The *Morrison* Court then went on to review a number of considerations that were important to the decision in *Lopez* and that guided the Court in reviewing the assertion of federal authority in *Morrison*. A review of these factors demonstrates that the assertion of federal jurisdiction in this case is well beyond the constitutional bounds established by this Court.

A. CWA Section 404 is Not a Regulation of Economic Activity

The first consideration identified by the *Morrison* Court is whether the activity being regulated is economic in nature. *See* 120 S. Ct. at 1750. The *Morrison* Court affirmed that this factor is critical, stating that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.*

The Seventh Circuit failed to consider whether the activity at issue was economic in nature. Moreover, ignoring the principle articulated in *Lopez* that courts may look to the aggregate impact of a class of activities on interstate commerce only in limited circumstances, the Seventh Circuit assumed without analysis that it was appropriate to consider the aggregate impacts of filling isolated waters in general. Indeed, the Seventh Circuit made no attempt to determine whether the isolated waters that SWANCC proposed to fill substantially affect interstate commerce. Rather, the court found that although the effect of the destruction of migratory bird habitat is unobservable with respect to each isolated pond, the aggregate effect, *i.e.*, the resulting decrease in bird populations, "substantially affects" interstate

commerce. This, the Seventh Circuit reasoned, is all the Commerce Clause requires. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d. 845, 850 (7th Cir. 1999) ("*SWANCC*").

The Seventh Circuit's conclusion runs counter to *Lopez* and *Morrison*. These decisions make clear that regulation of intrastate economic activity is analyzed differently from the regulation of intrastate non-economic activity. In particular, the Court has indicated that the effects of individual activities may be aggregated to achieve the required substantial effect on interstate commerce only where the activities in question are economic or commercial in nature, or where the regulation in question is part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 561; *Morrison*, 120 S. Ct. at 1750. The migratory bird rule does not meet this test.

1. *Filling of Isolated Waters is Not an Inherently Economic Activity*

The activities in question cannot be characterized as "economic" under the Court's Commerce Clause jurisprudence. When the Court has upheld federal regulation of intrastate activity "substantially affecting" interstate commerce, the cases have always involved activities or markets that were in and of themselves economic in nature, such as agriculture, the shipment of goods, or employment. *See e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (employment); *Hodel v. Indiana*, 452 U.S. 314 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (employment), *overruled on other grounds by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (barbecue restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (accommodations at inns and hotels); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944) (employment); *Wickard v. Filburn*, 317 U.S. 111 (1942) (regulation of interstate market in wheat); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (commercial milk sales); *Gibbons v. Ogden*, 22 U.S. 1, 9

Wheat. 1 (1824) (commercial navigation). All of these activities are inherently economic in nature.

The discharge of dredged or fill material is not an economic activity in this sense. Many discharges of dredged or fill material are undertaken for decidedly non-commercial reasons. For example, discharges into isolated waters may be undertaken by homeowners seeking to put in a driveway or a tennis court, or by non-profit organizations building churches or hospitals. Discharges may also be undertaken by state or local governments seeking to build libraries or even by the federal government itself undertaking a wide variety of activities from building military facilities to expanding national parks or wildlife refuges. Other discharges may be incidental to economic activities. For example, many who fill wetlands seek commercial gain or must conduct commercial activity in order to fill and develop wetlands. However, the fact that the filling of isolated waters may in some cases be economically motivated does not render the act of filling such waters economic in nature for purposes of the Commerce Clause. In *Lopez*, the respondent's possession of the handgun at issue was economically motivated in that Lopez was ultimately supposed to receive payment for delivering the gun. *See United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). The Court nevertheless found that the act of possessing the handgun was not itself an economic activity.

The conclusion that filling of isolated waters is not an inherently economic activity is further supported by the lack of any direct correlation between the activities being regulated and the impacts that assertedly serve as the link to interstate commerce. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court upheld the enforcement of penalties against a farmer for violating agricultural production quotas by growing wheat for his own consumption.

In *Wickard*, both the regulated activity and the economic impact involved the same subject matter, namely wheat, which is an economic commodity. In the current case, however, the activity being regulated is not,

for example, trade in migratory birds but rather is the filling of isolated waters. Thus, in this case there is no commonality of subject matter between the nature of the activity being regulated (*i.e.*, filling of isolated waters) and the purported impact of the regulated activity on interstate commerce (*i.e.*, fewer dollars being spent by individuals watching or hunting migratory birds). If one considers the purpose for which the fill is undertaken, *i.e.*, construction of a landfill, the disconnect with the purported economic impact is even greater. This lack of commonality further demonstrates that the filling of isolated waters is not an economic activity. Therefore, because the Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," *Morrison*, 120 S. Ct. at 1751, the Court should find that the filling of isolated waters in this case may not be regulated by the federal government.

2. *Corps Jurisdiction Over Isolated Waters Through the Migratory Bird Rule Cannot Be Sustained as Part of a Larger Regulation of Economic Activity*

The Court has indicated that even intrastate, non-economic activity may be regulated under the Commerce Clause in some circumstances. When an intrastate activity which is not in and of itself "economic" is "an essential part of a larger regulation of economic activity," it may "be sustained under [Supreme Court] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

However, the prohibition on the development of a landfill site due to the presence of 17.6 acres of semi-aquatic property used by migratory birds cannot be sustained as "an essential part of a larger regulation of economic activity." Though wetlands are often filled to produce more economically viable areas, the Section 404 program cannot be characterized as a regulation of economic activity. The program regulates a wide variety of activities, including many undertaken by homeowners

or by government agencies in connection with the provision of recreational facilities, parks, and even wildlife refuges. Thus, the Section 404 program is not a regulation of a commercial market or a class of economic activities. Nor is the Clean Water Act generally a larger regulation of *economic* activity. Indeed, the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C.A. § 1251(a) (1999), not to regulate markets or commercial activities.

Thus, because the regulation of isolated waters is not a regulation of economic activity and is not part of a larger regulation of economic activity, *Lopez* and *Morrison* do not permit the Corps to establish the requisite substantial effect on interstate commerce by aggregating the effects of impacts to all isolated waters. The Seventh Circuit's decision to the contrary therefore conflicts with *Lopez* and *Morrison*.

B. The Migratory Bird Rule Does Not Constitute a Jurisdictional Element that Would Ensure, through Case-by-Case Inquiry, that the Activity Being Regulated Affects Interstate Commerce

The second consideration identified in *Morrison* is whether the statute in question has a jurisdictional element that might limit the reach of the statute to activities that have the necessary connection with interstate commerce. Thus, even though it regulates non-economic, intrastate activity, the migratory bird rule could still fall within the bounds of Congress' Commerce Clause authority if it constituted or included an appropriate jurisdictional element requiring that the requisite interstate commerce connection be determined on a case-by-case basis. *See Lopez*, 514 U.S. at 561-62. Although the Corps regulation that the migratory bird rule purports to interpret contains a jurisdictional element, *see* 33 C.F.R. § 328.3(a)(3) (federal jurisdiction extends to waters if their use, degradation or destruction could affect interstate commerce), this jurisdictional

element cannot rescue the migratory bird rule from constitutional infirmity.

First, the test set forth in the migratory bird rule does not appropriately limit the universe of waters that are made subject to regulation because the rule fails to require that the Corps demonstrate that the use, degradation or destruction of an isolated water would substantially affect interstate commerce. Indeed, the jurisdictional element goes so far as to cover those areas with only a potential link to migratory bird use and therefore a potential link at best with interstate commerce. Thus, the Corps is not required by its regulations to demonstrate that the isolated water has been used in a way that would even begin to establish any connection with interstate commerce, much less a substantial connection.

Second, the migratory bird rule defeats the purpose of a jurisdictional element because it effectively eliminates the requirement that an impact on interstate commerce be demonstrated on a case-by-case basis. Because migratory birds are everywhere, the Corps easily meets the jurisdictional test in every case. Finally, unlike other jurisdictional elements that have been held sufficient by courts to sustain statutes against constitutional challenges, *see, e.g., United States v. Bass*, 404 U.S. 336 (1971), the jurisdictional element in this case is not found in the statute but in the regulations and therefore may be changed at the whim of the Corps. Thus, the jurisdictional element in the Corps' regulations cannot save the migratory bird rule.

C. Congress Made No Findings Regarding the Impact on Interstate Commerce of Migratory Bird Use of Isolated Waters

The third consideration identified by the Court in *Morrison* is the existence of legislative findings regarding the impacts of regulated activities on interstate commerce. The Supreme Court stated in *Lopez* that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has

on interstate commerce." 514 U.S. at 563. *See also Morrison*, 120 S. Ct. at 1751 (quoting *Lopez*). However, the existence of such findings may assist a court in evaluating Congress' judgment that the activity at issue substantially affects interstate commerce, even though no substantial effect is readily apparent. *See id.*

Like the Gun Free School Zones Act in *Lopez*, neither the CWA nor its legislative history contain any congressional findings regarding the impacts of filling of any waters, to say nothing of isolated waters as a class, on interstate commerce. Section 404 of the CWA and the definition of "navigable waters" originated in the Federal Water Pollution Control Act Amendments of 1972. Throughout hundreds of pages of legislative history associated with the passage of the Act, Congress never mentioned isolated waters, and it certainly gave no indication that it intended to regulate isolated waters as a class, despite the fact that the extension of federal jurisdiction to isolated waters implicates many millions of acres. There is no discussion of the economic impacts of isolated waters in the legislative history and certainly no hint that Congress thought that activities in isolated waters would affect populations of migratory birds.[4] Thus, the CWA and its legislative history are of no help to Respondent in attempting to establish the required substantial impact on interstate commerce.

D. The Link Between Filling Isolated Wetlands Visited by Migratory Birds and Interstate Commerce is Attenuated and Unsubstantiated

[4] This omission is not at all surprising since it was not until 1985 that the Corps and EPA, under prompting from a single Senator, conceived the notion of assertion of jurisdiction over isolated waters based on their use by migratory birds. *See* Memorandum from Francis S. Blake, General Counsel, U.S. Environmental Protection Agency to Richard E. Sanderson, Acting Assistant Administrator, U.S. Environmental Protection Agency, "Clean Water Act Jurisdiction Over Isolated Waters" (1985).

The fourth consideration identified as important by the *Morrison* Court arises from the fact that the Court's decision in *Lopez* was based in part on the attenuated nature of the link between the regulated activities and their effect on interstate commerce. *See Lopez*, 514 U.S. at 563-67; *Morrison*, 120 S. Ct. at 1751. In *Lopez*, the government argued that the possession of guns might lead to violent crime, which would affect the national economy through increased insurance costs and unwillingness of individuals to travel to areas perceived as unsafe. *See Lopez*, 514 U.S. at 563-64. The government also argued that the presence of guns in schools threatens the educational process, resulting in a less productive citizenry, which in turn would adversely affect the Nation's economic well-being. *See id.* at 564. Although the economic effects of crime on society may be great, this does not mean that possession of guns affects interstate commerce. Accordingly, the Court rejected the "costs of crime" argument because it would allow Congress to regulate all violent crime, as well as any activity that may lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, it rejected the "national productivity" argument because it would grant Congress authority to regulate any activity it found was related to the economic productivity of individual citizens. *See id.* Under these two theories, the Court would be "hard pressed" to imagine any activity that Congress would not be able to regulate. *See id.*

The Seventh Circuit's rationale in this case is, if anything, more problematic than the reasoning rejected in *Lopez* and *Morrison*. Relying on *Hoffman Homes, Inc. v. Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993) ("*Hoffman Homes*") and on statistics contained in a survey conducted by the U.S. Fish and Wildlife Service and the Bureau of the Census, the Seventh Circuit found that millions of people annually spend billion of dollars engaging in activities such as watching and hunting migratory birds. Relying solely on *Hoffman Homes*, the Court went on to find that the destruction of migratory bird habitat and an attendant decrease in some bird

populations substantially affects interstate commerce. This purported connection between isolated waters and interstate commerce is at least as tenuous as that in *Lopez* and *Morrison* and is also largely unsubstantiated.

1. *The Purported Impact on Interstate Commerce Relied on by the Seventh Circuit is Unsubstantiated*

As noted, the Seventh Circuit's sole authority for the proposition that filling isolated waters substantially affects interstate commerce is its prior decision in *Hoffman Homes*. However, *Hoffman Homes* is a very slender reed that cannot bear the weight of such a significant constitutional determination. First, the statement of the *Hoffman Homes* court regarding the impacts of the cumulative loss of wetlands related to *all* wetlands, not the loss of isolated waters. Even as to the larger class of all wetlands, the court in *Hoffman Homes* did not find that the loss of habitat substantially affected interstate commerce, as suggested by the court in *SWANCC*. Rather, the *Hoffman Homes* court was considering the very different issue of whether EPA had reasonably interpreted its own regulations when it asserted jurisdiction over an isolated wetland based on its potential use by migratory birds. *See id.* at 260.

Second, the *Hoffman Homes* decision does not in fact provide any foundation for the proposition that loss of isolated waters substantially affects interstate commerce in the form of bird-watching and hunting. As support for this proposition, the *Hoffman Homes* court merely cites a 1985 North American Waterfowl Management Plan.[5] *See id.* at 261. That document states without citation of authority that waterfowl "generate" a "direct expenditure" of several billion dollars a year. The document goes on to state that changes in the landscape induced by man have "affected the distribution and abundance of several species," resulting in increases in

[5] The court also cites two cases which in fact provide little or no support. *See Hoffman Homes*, 999 F.2d at 261.

some populations and decreases in others. Thus, *Hoffman Homes* provides scant support for the argument that loss of isolated waters substantially affects interstate commerce.

The flaws in the Seventh Circuit's argument do not end there. In fact, the Court's rationale strongly suggests that the purported impacts on interstate commerce are non-existent. The *Hoffman Homes* court and the Seventh Circuit below indicated that the filling of isolated waters and the decline of some bird populations will cause people to have a diminished opportunity to hunt and observe those birds. They did not assert that filling isolated waters will actually cause fewer people to travel to birdwatch or hunt. For example, assume that bird-watchers travel to a certain area to observe twenty different species of birds. It does not follow that if the area changes so that it only supports ten different species, bird-watchers will stop visiting that particular site all together. On the contrary, they presumably will continue to frequent that area to study the birds that remain and go elsewhere to observe other species. Moreover, while some bird species have seen population declines in the past thirty years, as many or more species have seen population increases. According to the U.S. Geological Survey's North American Breeding Bird Survey, over one-half of more than 421 bird species have shown an increase in population during approximately the last 30 years. One group of those 421 species represents wetland/open water birds species, nearly two-thirds of which have increased in numbers since 1966.[6]

Perhaps more importantly, the statistics cited by the Seventh Circuit show that more people, not fewer, are traveling interstate to engage in bird-related activities. For example, the Seventh Circuit noted that in 1996, 14.3 million people traveled across state lines specifically to

[6] *See* U.S. Geological Survey, North American Breeding Bird Survey (visited July 25, 2000) <http://www.mbr.nbs.govp/bbs/guild/group98.html>.

observe birds, citing the 1996 National Survey of Fishing, Hunting and Wildlife Associated Recreation. *See SWANCC*, 191 F.3d at 850. According to the 1985 version of the same study, bird-watchers accounted for 11 million interstate trips per year. *See* National Survey of Fishing, Hunting and Wildlife Associated Recreation, 45 (1988). Thus, the surveys reveal a 30 percent increase in the number of trips being taken by interstate travelers to observe birds over the period from 1985 to 1996, hardly a sign of diminished opportunities for bird-watching. Therefore, assuming that the Seventh Circuit is not incorrect in its assertion that the cumulative loss of wetlands has reduced some bird populations, it is clear that the Seventh Circuit has incorrectly assumed that a reduction in some migratory bird populations has resulted in diminished birdwatching opportunities. Statistics show that this simply is not the case. Thus, the Seventh Circuit's conclusion that the destruction of migratory bird habitat and the resulting decrease in the populations of birds "substantially affects" interstate commerce does not withstand scrutiny.

2. *The Seventh Circuit's Logic Has No Stopping Point*

Even if they were substantiated, the purported impacts on interstate commerce in this case are too attenuated to provide a basis for the assertion of federal power. The chain of inference is a lengthy one: filling isolated waters results in a loss of habitat for migratory birds; loss of habitat results in an overall decline in some populations of migratory bird species; a decline in some bird populations results in diminished opportunities for hunting or observing that particular species; significant numbers of individuals who wish to hunt or observe the particular species whose numbers have diminished will forgo bird-watching or hunting trips or otherwise modify their travel. This is exactly the sort of piling of inference upon inference that was rejected by the Court in *Lopez* and *Morrison*.

Moreover, like the arguments made in support of federal regulation in those cases, the rationale of the

Seventh Circuit must be rejected because it has no logical stopping point and would obliterate the distinction between what is national and what is truly local. Indeed, the Seventh Circuit's decision below would allow the Federal government to regulate the use of nearly every inch of land in the United States. First, given the Corps' expansive definition of wetlands and water bodies, the Corps would have authority to exercise jurisdiction over millions of acres containing isolated waters, without regard for their size or location.[7] The Corps' regulations state that it may assert jurisdiction over such isolated wetlands if the use, degradation, or destruction of those wetlands could affect interstate commerce. The Corps' regulations go on to specifically enumerate several categories of isolated waters that meet this test. Generally, the isolated waters identified in the Corps study are too small to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes in interstate commerce. *See* 33 C.F.R. §§ 328.3(a)(3)(i)-(iii). Thus, the migratory bird rule is the only route by which the federal government can assert jurisdiction over these areas.

This, however, matters little because the migratory bird rule is the only jurisdictional tool the Corps needs. As the Seventh Circuit itself noted, somewhere between

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[7] A 1995 Corps study of isolated wetlands measuring less than one-half acre documents the migratory bird rule's importance in establishing federal jurisdiction over tiny, remote areas. The Corps' study did not include data from Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, or West Virginia. It did not include isolated wetlands measuring one-half acre or larger, and it excluded "other waters" (such as ponds) that are not wetlands. Even with these omissions, the Corps' study found that there are 8,309,502 discrete isolated depressional areas meeting the federal wetlands definition scattered across 1,836,469 acres of the American landscape. *See* U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) ("1995 Corps Data Forms").

2.5 and 6 billion birds inhabit the United States, two-thirds of which migrate. *See SWANCC*, 191 F.3d at 850. Nothing can prevent these birds from traveling throughout the Western Hemisphere and eventually alighting on any land or water in the United States. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service). In one study, for example, researchers marked birds in North Dakota and later recovered them in 46 states, ten Canadian provinces and territories, and 23 other countries.[8] In addition, the migratory bird rule does not even require actual "use" by birds; potential use is sufficient, and there is no minimum standard for kind or frequency of use, or a requirement that a water be used by a particular type of migratory bird such as waterfowl. Thus, the migratory bird rule in practice provides the basis for the Corps to assert jurisdiction over virtually all of the 8 million depressional areas identified in its study. Clearly, the impacts of Corps jurisdiction based on the migratory bird rule are widespread.

While the Seventh Circuit purported to impose limits on the Corps' jurisdiction by citing a definition of habitat ("the place where a plant or animal species naturally lives or grows[,]" Webster's Third New Int'l Dictionary 1017 (1993)), such a limitation is an empty gesture. As previously noted, two-thirds of the 2.5 to 6 billion birds in the United States migrate. Moreover, birds can and do live anywhere, including a wide variety of urban and suburban environments. Therefore, allowing the Corps to regulate the habitat of migratory birds gives the Corps carte blanche to regulate any isolated water it chooses, effectively giving the Corps land use control over millions of acres of property under the guise of regulating "navigable waters."

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[8] *See* U.S. Fish & Wildlife Serv., Wetlands of the United States: Current Status and Recent Trends 1 (1984).

Of course, under the Seventh Circuit's rationale, there is no need for Congress to require the Corps to end its regulation at the water's edge or at the boundary of some wetland. If the presence of avian habitat automatically confers federal jurisdiction, there is no corner of the Nation that would remain off-limits to the federal government, truly obliterating the distinction between what is national and what is local. *Lopez*, 514 U.S. at 567.

The Seventh Circuit's faulty logic is similar to that of the *Morrison* petitioners, which as the Court noted would lead to endless congressional regulation of crime, as long as the nationwide, aggregated impact of a crime has substantial effects on employment, production, transit, or consumption. *See* 120 S. Ct. at 1752-1753. Moreover, by permitting Congress to regulate gender-motivated violence, it surely would be able to regulate all violent crime, since violent crime in general would certainly have a broader economic impact than its subset, gender-motivated violence. *See id.* Similarly, petitioners' reasoning in that case would have allowed Congress to regulate, for example, family law since the aggregate economic effect of marriage, divorce, and childrearing is significant. *See id.*

Likewise, following the Seventh Circuit's logic in the present case would lead to federal regulation of the filling or dredging of every pit, pond, depression, ditch, pool, trough, puddle, pothole, rut, dip, trench, and channel. Moreover, it would open the door to general federal regulation of land use. The Commerce Clause cannot be read to allow Congress to pre-empt an area of regulation that, as discussed below, has traditionally been the province of state and local governments.

Thus, the rationale of the Seventh Circuit cannot be squared with *Lopez* and *Morrison*. The Seventh Circuit would allow a relatively trivial impact on commerce to serve as an excuse for broad general regulation of private activities, a result which this Court has cautioned against.

Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968).[9] The Corps' assertion of jurisdiction must be rejected.

II. THE ASSERTION OF FEDERAL JURISDICTION OVER ISOLATED WATERS MUST BE SCRUTINIZED CAREFULLY BECAUSE LAND USE IS AN AREA OF TRADITIONAL STATE CONCERN

The migratory bird rule warrants careful scrutiny by this Court because, in determining whether development may occur in particular areas, the federal government treads upon ground traditionally reserved to the States by the Tenth Amendment. See *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed"). *See also Morrison*, 120 S. Ct. at 1754 (expressing concern that petitioner's logic would authorize federal regulation of areas of traditional state regulation such as family law). The use of real property is a traditional State concern. *See Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).[10] In particular, States are regarded as the proper governing

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[9] Regulation of isolated waters is not the regulation of a class of activities such as might authorize the assertion of federal authority despite the trivial nature of any impacts on commerce associated with particular isolated waters. *See Wirtz*, 392 U.S. at 192. As Respondent conceded more than a decade ago, there is no indication in the statute or the legislative history that Congress intended to regulate isolated waters as a class. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 50, *National Wildlife Fed'n v. Laubscher* (S.D. Tex. 1987) (No. G-86-37).

[10] In fact, the Court has previously noted that "regulation of land use is perhaps the quintessential state activity." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

body to enact and enforce property laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land-use planning has been sustained against constitutional challenge as long ago as the decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). *See also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (state land-use law applicable to federal land). Moreover, decisions regarding local land use "properly rest with the community that is ultimately – and intimately – affected." *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). Thus, zoning and other aspects of land use regulation "are particularly within the province of local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). *See also Evans v. Board of County Commissioners*, 994 F.2d 755, 761 (10th Cir. 1993) (land use policy is a feature of local government and an area in which the tenets of federalism are particularly strong).

According to the Corps, because the 17.6 acres at issue serve as a habitat for migratory birds, the Corps has authority to prohibit SWANCC from developing the property as a landfill, and in fact did so. As a result, the Corps has effectively overridden the plan promulgated by 23 municipalities to address a local issue as basic as where to dump their garbage, in the process disrupting local land-use plans and zoning decisions and diminishing local governments' ability to address an issue of vital concern to its citizens. This intrusion is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment. *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) ("'[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *New State Ice Co. v. Liebmann*, 285 U.S. 262,

311 (1932) (Brandeis, J., dissenting) (as a "social laboratory," States have the ability to react to local problems in a manner best adapted to local needs). States must not be prohibited from "exercising their own judgment in an area to which States lay claim by right of history and expertise [through regulation of] an activity beyond the realm of commerce in the ordinary and usual sense of that term." *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

By utilizing the migratory bird rule to exercise jurisdiction over intrastate, isolated waters, the federal government has effectively preempted traditional State authority over the use of millions of acres of land.[11] In the absence of the migratory bird rule, these areas would be subject to the wetlands laws enacted by many States and over 5,000 local governments.[12] Unfortunately,

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[11] As an example of the broad reach of the federal program, consider the State of Georgia's approximately 240,000 isolated wetlands that are each less than one-half acre. *See* 1995 Corps Data Forms. The migratory bird rule provides the federal government with 240,000 opportunities to trump State and local authorities in their traditional role as regulators of land use.

[12] *See, e.g.*, Conn. Gen. Stat. §§ 22a-28 to -45a (2000); Fla. Stat. Ann. §§ 373.414 - .421 (2000); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -Z (2000); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (2000); Mich. Comp. Laws §§ 324.30301 - .30323 (2000); Minn. Stat. § 103G.222 - .2373 (2000); N.H. Rev. Stat. Ann. §§ 482-A:1 - :27 (2000); N.J. Rev. Stat. §§ 13:9B-1 to -30 (2000); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1305 (2000); Vt. Stat. Ann. tit. 10, § 1272 (2000). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42 (2000); Me. Rev. Stat. Ann. tit. 38, § 480-F (2000); Minn. Stat. § 103G.2243 (2000); N.Y. Envtl. Conserv. Law § 24-0501 (2000). For examples of local ordinances or by-laws regulating isolated waters and wetlands, see Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); and Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife

where property contains isolated waters as defined by the federal government, State and local governments cannot implement their land use regulations until the federal government approves the local development projects – a textbook violation of the basic principles of federalism.[13]

Moreover, the very structure of the CWA evidences a congressional respect for these federalism principles that the migratory bird rule undermines. When Congress enacted the CWA, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C.A. § 1251(b) (1999). Therefore, Congress elected not to regulate all sources of water pollution, leaving the control of runoff from agricultural and silvicultural operations to the states. Congress also

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of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture) available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

[13] As Petitioners note in their brief, this federal veto authority over state and local land use decisions is of more than academic interest. Local development projects are not infrequently opposed by local citizens for a variety of reasons having little to do with the environment but everything to do with perceived impacts on property values and related concerns. This is the now familiar "NIMBY" syndrome. The concerns of such project opponents are properly dealt with by local land use authorities. Nevertheless, such opponents are often able to use the Section 404 permitting requirements to fight a project simply because of the Corps' *de facto* veto authority over local land use decisions. Thus, all too often the Corps becomes an active participant in local land use debates that are driven by NIMBYism rather than regard for the aquatic ecosystem.

excluded groundwater from the CWA's coverage to prevent federal interference with complex state jurisdictional rules. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). In addition, Congress enacted Section 208 to encourage the States to develop waste treatment management plans that would cover pollution sources not regulated by federal law. *See* 33 U.S.C.A. § 1288 (1999). Congress clearly tried to strike a careful balance, asserting federal authority where necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere.

The migratory bird rule nullifies this balance, extending federal authority to more than eight million isolated depressions, most of which would be covered under State or local regulations. In the absence of a clear statement by Congress of its intent to change the federal/state balance, the Court should not countenance such a dramatic displacement of traditional state authority. *United States v. Bass*, 404 U.S. 346, 349 (1971). As shown below, no such evidence of congressional intent exists.

III. DUE TO GRAVE CONSTITUTIONAL CONCERNS REGARDING THE MIGRATORY BIRD RULE, THE CWA SHOULD BE READ NARROWLY TO EXCLUDE JURISDICTION OVER ISOLATED WATERS

According to the Supreme Court, when an Act's interpretation raises "serious constitutional concerns," the Court must independently inquire whether there is another, less objectionable interpretation that may be ascribed to the Act. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 577 (1988). *See also National Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (where expansive reading of statute would raise serious constitutional questions, the Court requires a clear expression of congressional intent

before concluding that the statute grants jurisdiction). Because the migratory bird rule raises serious constitutional concerns regarding the extent to which the Commerce Clause's limits may be stretched, the Court should read the CWA narrowly to exclude jurisdiction over isolated waters.

A. The Court Cannot Completely Ignore the Concept of Navigability

In enacting the CWA in 1972, Congress chose to assert jurisdiction over "navigable waters." 33 U.S.C. § 1311(a). Nothing in the plain language of the statute or its legislative history suggests that, in using this jurisdictional phrase, Congress used the word "navigable" as mere surplusage and intended it to have no particular import. In fact, while Congress defined "navigable waters" as "waters of the United States," Congress had a long history of using these or similar terms that demonstrates that in 1972 Congress understood all such terms to incorporate some notion of navigability.

For example, in 1899 Congress passed a Rivers and Harbors Appropriations Act (including what is sometimes known as the Refuse Act) which made it unlawful to construct any bridge, causeway, dam or dike over or in, *inter alia*, any navigable river or other "navigable water of the United States" without specific approvals. 33 U.S.C. § 401. At the same time, Congress prohibited the creation of any obstruction to the navigable capacity of any "waters of the United States" unless authorized by Congress, and prohibited the excavation or filling of, *inter alia*, the channel of any "navigable water of the United States" unless authorized by the Secretary of the Army. 33 U.S.C. § 403. As part of the same Act, Congress made it unlawful to discharge any refuse matter into any "navigable water of the United States" or to deposit any material on the bank of any "navigable water" where it might be washed into the navigable water. 33 U.S.C. § 407. *See also* Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499 (authorizing

regulations for operation of drawbridges built across "navigable rivers or other waters of the United States"). There is no indication that Congress intended these various terms to be anything other than interchangeable. *See, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 484-87 (1960) (reading terms as being essentially coextensive). Moreover, there can be no dispute that Congress intended all of these terms to be tied to the concept of navigability.

Congress continued its interchangeable use of these terms over the ensuing decades. For example, in passing the Federal Power Act in 1920, Congress used the terms "navigable waters of the United States" and "navigable waters" interchangeably. *See* 16 U.S.C. § 817. *See also* Act of Sept. 15, 1922, c. 313, 42 Stat. 844, 33 U.S.C. § 472 (concerning marking of anchorage grounds for vessels in "waters of the United States"). As late as 1972, only three weeks before passing the CWA, Congress again made use of the term "navigable waters" in a context that makes clear that the term was based on notions of navigability. *See* 33 U.S.C. § 535i.

It was in the context of this long history that Congress invoked the phrase "navigable waters" in defining the scope of the CWA. In light of this history, it is evident that the term "waters of the United States" was not intended to convey a wholly different meaning, one without any connection to navigability. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (Congress is assumed to have intended legal term of art to have its established meeting).

The legislative history of the CWA does not suggest a different result. Rather, the legislative history indicates that, as the Court indicated in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), when Congress defined "navigable waters" as "waters of the United States" it merely renounced regulatory limits under other water pollution control statutes and began to regulate waters that would not be deemed "navigable" under that term's classic definition. *See id.* at 133 (quoting Sen. Conf. Rep. No. 92-1236, 144 (1972); 118 Cong. Rec.

H33,756-57 (1972) (statement of Rep. Dingell). Congress simply intended to define the term pursuant to then recent judicial opinions that "expanded that limited view of navigability . . . to include waterways which would be 'susceptible of being used . . . with reasonable improvement.'" 118 Cong. Rec. H33,756 (1972) (statement of Rep. Dingell) (quoting *United States v. Utah*, 283 U.S. 64, 72 (1931)). In other words, the text was designed to reference the broader definitions of "navigable waters" and "waters of the United States" established by this Court. However, such broader definitions do not encompass isolated waters without any connection to navigation.

Moreover, there is no suggestion in the legislative history of the 1972 Act that Congress had any intent to regulate waters that are not connected in any way to waters that are navigable in fact. There is simply no mention in the legislative history of isolated wetlands or other isolated waters such as ponds, dry washes, or ephemeral waters. Thus, the meaning of the statement in the House and Senate conference reports that the conferees intended to give "navigable waters" the broadest possible constitutional interpretation is clear. *See* S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972); H.R. Rep. No. 911, 92d Cong., 2d Sess, 131 (1972). Congress clearly intended that the CWA regulate waters capable of navigation by reasonable improvement. Had Congress' intent been otherwise, it would have said so expressly.[14]

Despite the evident intent of Congress, the Corps' definition renders "navigable" completely meaningless. Although the Court may determine, as it did in *Riverside Bayview*, that the CWA's definition of "navigable waters" indicates that the term "navigable" is of limited import, it

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[14] Congress certainly knew how to craft statutory language that would assert federal jurisdiction to the maximum extent allowed by the Commerce Clause. *See, e.g.*, 33 U.S.C. § 817 (waters "over which Congress has jurisdiction under its authority to regulate commerce").

should not completely ignore the concept of navigability. To drain the word "navigable" of any meaning at all would run counter both to history and to the cardinal principle of statutory construction that the Court must give effect, if possible, to every word of a statute. *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000). Indeed, "navigable" must assume some significance because had Congress intended that the word have no meaning at all, it would have employed another term in its place.

In short, when Congress defined "navigable waters" as "the waters of the United States," it did not grant the Corps the authority to regulate water bodies in the broad and constitutionally suspect manner approved by the Seventh Circuit. *See generally United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (Because the Corps' regulation defining "navigable waters" includes intrastate waters that need have no connection whatsoever to navigable or interstate waters, it expands the term "waters of the United States" beyond permissible limits). Therefore, this Court should interpret the CWA in light of the constitutional hurdles that would arise by reading the Act so broadly that it allows the Corps, through the migratory bird rule, to assert jurisdiction over waters without a connection to interstate or navigable waters, or waters that do not otherwise substantially affect interstate commerce. *See id.* at 258.

B. The Fact that an Expansive Reading May Further the Goals of the CWA is Irrelevant

Respondents have argued that SWANCC's contention that the term "navigable waters" should be limited to waters that are navigable in fact, interstate, or closely related to navigable or interstate waters is adverse to the purpose of the CWA. *See* Brief for the Respondents in Opposition to Petition for A Writ of Certiorari, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178. Implicit in this contention is that allowing the Corps broad authority to regulate isolated waters based on their possible use by

migratory birds furthers the CWA's objectives. However, the fact that a broad reading of a statute may further the statute's purpose is immaterial:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Moreover, the Court has noted that application of broad legislative purposes at the expense of specific provisions ignores the problems Congress must resolve and the dynamics of the process in which Congress must engage to resolve them. For example, although Congress may unanimously enact a piece of legislation, its members may differ drastically on the means by which that legislation will be implemented. Thus, the final statutory language may reflect hard-fought compromises. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). "[I]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374.

Clearly, allowing the Seventh Circuit's expansive reading of the CWA simply because it might somehow further the purpose of the Act is inappropriate. Based on this Court's jurisprudence, the Court should interpret the CWA based on the Act's final statutory language and refuse to allow the Corps to engage in an unreasonable expansion of the CWA's terms.

CONCLUSION

For the foregoing reasons, the Court should reverse the Seventh Circuit's decision granting the Corps the authority to regulate isolated waters based on their use by migratory birds.

Respectfully submitted,

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SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE NATIONWIDE PUBLIC PROJECTS COALITION, THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION, and THE METROPOLITAN DENVER WATER AUTHORITY IN SUPPORT OF PETITIONER

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Mich. Comp. Laws §281.701-722 (1994). 20

Min. Stat. §103G.222-2242 (1994) 20

N.H. Rev. Stat. Ann. §482-A:1-:27 (1994). 20

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N.Y. Envtl. Conserv. Law §§24-0101-1301 (Consol. 1994). 20

Pa. Stat. Ann. Tit. 25, §105.17 (1993). 20

R.I. Gen. Laws §§2-1-18 to -24 (1994) 20

Va. Code Ann. §§62.1-44.3-44.5 (2000). 20

Vt. Stat. Ann. Tit. 10, §1272 (1994) 20

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40 C.F.R. §230. 17

40 C.F.R. §233.70 24

40 C.F.R. §233.71 24

Other Authorities:

Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 21

California Environmental Protection Agency, *State of the State's Wetlands* (1998) 23

Congressional Budget Office, *Trends in Public Infrastructure Spending* (May, 1999) 14, 15

Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands, in Wetland Protection: Strengthening the Role of the States* 225 (Association of State Wetland Managers ed., 1985) 21

Therese Dunphy, *Corps' New Nationwide Permit Restrictions Leave Producers Very Little Room to Maneuver*, Aggregate Manger, June 2000 17

Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution* (1998). 25

Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of the National Association of State Departments of Agriculture) 17

Institute for Water Resources, *U.S. Army Corps of Engineers, Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permits* (2000) 18

Jon A. Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends* (Association of State Wetland Managers ed., 1994) 21

National Association of Counties, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (January 2000) 18

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10.699 (1972) 8

U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999) 23

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The Nationwide Public Projects Coalition, the American Road and Transportation Builders Association, and the Metro Denver Water Authority, as *amici curiae*, respectfully submit this brief in support of Petitioner Solid Waste Agency of Northern Cook County, pursuant to Rule 37.3 of the Supreme Court Rules.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are public sector agencies and associations, local governments, and private entities that provide essential services to the public.

Nationwide Public Projects Coalition (NPPC) is a not-for-profit association whose members include state, regional and local government agencies and associations and private sector entities. Its members represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC fundamentally represents the interests of the public in ensuring that vital public infrastructure services such as municipal, industrial and agricultural water supply, flood control, irrigation, wastewater treatment, stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities are provided in a safe, timely and environmentally-beneficial fashion. Consisting predominantly of public officials and firms that serve public sector needs, NPPC's members must ensure that a responsible balance is

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[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

achieved between environmental, health, and safety goals and the protection of lives and property.

American Road and Transportation Builders Association ("ARTBA") is made up of 5,000 member organizations in the transportation construction industry, including construction contractors; professional engineering firms; federal, state and local transportation administrators; heavy equipment manufacturers; and materials suppliers. These member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

The Metro Denver Water Authority (MDWA), a political subdivision and public corporation of the state of Colorado, is made up of 15 Suburban Denver cities, counties and special districts that provide water and/or wastewater services to about 1,300,000 persons.

This case could have a profound impact on the *Amici,* and on the public that they serve. The U.S. Army Corps of Engineer's ("Corps") assertion of Clean Water Act ("CWA")[2] regulatory jurisdiction over isolated bodies of water such as manmade ponds, drainage ditches, vernal pools, swales, rainwater filled depressions and excavation ditches, intermittent streams and drainages, dry washes and other remote, ephemerally wet areas alleged to be actual or potential habitat for migratory birds affects public and private projects throughout the Nation. As discussed below, the resources at issue in this case are not waters or wetlands in the traditional sense, but rather are often low points in the landscape where rainwater collects.[3] Taken to its logical conclusion, this

[2] Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (1994).

[3] "A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. Generally, [footnote continued]

overreach of federal jurisdiction via the migratory bird rule could have a chilling effect on public projects by allowing the Corps and the Environmental Protection Agency ("EPA")[4] to override carefully considered decisions and investments of state and local governments that are intended to meet vital public needs, including life-saving infrastructure. The potential impact of the migratory bird rule affects a broad array of public projects.

1. *NPPC's* members regularly are subject to the CWA section 404 permit program. For example, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. These agencies require authorization from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the maximum capacity and proper function-

it is inundated part of the year and is dry during the summer, and may or may not be connected with other hydrological features." *Borden Ranch Partnership v. U.S. Army Corps of Engineers,* No. S97-0858, 1999 WL 1797329, at *1 (E.D. Cal. Nov. 8, 1999) (describing wetlands at issue in enforcement action). "Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains." *id.*

[4] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. *See* 43 Op. Attorney General No. 15 (September 5, 1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. *See* Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989).

ing of the flood control systems in the case of a major flood event. These activities are especially critical for NPPC members in Southern California that must rapidly clean out accumulated sediment from flood control channels to prevent flood damage and loss of life. Many of these areas have water during storms but are otherwise dry.

2. *Metro Denver Water Authority ("MDWA")* is supported by annual membership assessments based on the number of water and/or sewer taps provided. The population growth rate in MDWA's region is among the highest in the United States and, accordingly, new infrastructure needs are substantial. MDWA has legitimate concerns that assertion of jurisdiction over isolated and ephemeral waters will make it very difficult to construct and maintain new water and sewer facilities in a timely manner and could severely impact the Authority's ability to provide vital public services, particularly when emergencies arise.

3. *ARTBA's* members provide vital transportation infrastructure such as highways, bridges, airports, railroads, mass transit facilities, and similar structures. Construction and maintenance of transportation infrastructure often requires access to wetlands, streams, lakes, and rivers. Accordingly, ARTBA members regularly require authorization from the Corps to provide and maintain the Nation's valuable transportation infrastructure. ARTBA's members include public agencies responsible for the construction of transportation systems, aggregate miners that produce materials used in transportation projects, and members that construct stormwater management facilities for transportation projects. The assertion of federal jurisdiction over man-made waters such as roadside drainage ditches and seasonally wet depressions has substantially impacted necessary public transportation infrastructure projects.

It is *Amici's* belief that, if the Seventh Circuit's interpretation is upheld, the intrusion of the federal agencies into the state and local public projects process will significantly impede the ability of public entities to provide essential services. The *Amici's* diverse membership must be able to rely on minimal levels of certainty and predictability in the processes that are necessary for design and implementation of public works projects. The *Amici's* members invest countless hours and hundreds of millions of tax dollars planning, assuring financing, preparing for, and constructing public service projects of equal or greater importance and cost than the Solid Waste Agency of Northern Cook Cook County ("SWANCC") balefill. If public projects that impact only intrastate, isolated waters are subject to federal supremacy that overrides local authority to plan, site and approve such projects, countless hours and millions of tax dollars for vital public works projects would be needlessly sacrificed.

Moreover, the requirement that public agencies obtain section 404 permits for repetitious and routine maintenance activities such as clearing vegetation from flood control channels, debris basins and other catchment areas disrupts normal maintenance schedules and delays needed maintenance work. Such a requirement also increases the cost of that work, and in some cases exposes lives and property to unnecessary risk. The long-range consequences for the Nation may include significant decreases in not only the quantity and quality of public works projects, but also the ability to timely deliver public services necessary to protect public health and welfare.

SUMMARY OF ARGUMENT

1. The migratory bird rule's intrusion into matters traditionally reserved to state and local governments cannot be permitted, absent a clear statement of Congressional intent. By limiting the Corps's jurisdiction to "navigable waters," and by expressly recognizing, preserving, and protecting the "primary responsibilities" of states with respect to "land and water resources," Congress expressed its clear intent *not to* authorize jurisdiction over isolated, intrastate waters lacking any meaningful connection to interstate commerce. The Seventh Circuit's ruling contravenes these principles.

2. The Seventh Circuit's interpretation could have a significant adverse effect on vital public projects. The Corps's expansion of jurisdiction to include all potential migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public projects impacting isolated "wet areas" based on an alleged federal interest in the "aggregate" health of the Nation's migratory bird population.

3. Assertion of jurisdiction over isolated intrastate waters violates fundemental principles of federalism by intruding into areas traditionally reserved for state and local regulation. State regulatory schemes provide adequate protection for isolated, intrastate waters. There are many state programs that regulate wetlands and control non-point source pollution. These programs provide adequate protection for the functions of isolated, intrastate waters.

ARGUMENT

I.

THE MIGRATORY BIRD RULE VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM. ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES.

Both the trial and appellate courts improperly deferred to the Corps's assertion of jurisdiction over isolated waters that were not "navigable" in any true sense. In fact, the waters involved in this case were essentially rain filled trenches excavated by strip mining in upland areas. The Seventh Circuit, while acknowledging that the Corps made no finding that the use of the site by migratory birds had any actual effect on interstate commerce, held that "a single activity that itself has no discernable effect on interstate commerce may still be regulared if the aggregate effect of that class of activity has a substantial effect interstate commerce." Pet. App. 6a. This holding is of particular importance to *Amici's* public works projects. The expansion of the definition of "navigable waters" to encompass isolated water bodies with no direct connection to interstate commerce expands the authority of the federal agencies to influence, and indeed, as was the case with SWANCC, negate carefully planned public works projects. This overreach intrudes into matters traditionally reserved to state and local governments – an intrusion that the Court has held cannot be permitted, absent a clear statement of Congressional intent.

A. The Clear Statement Principle Limits the Reach of Section 404 Regulatory Jurisdiction.

Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters, stating:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. §1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U.S.C. §1370. In furtherance of these policies, Congress declined to extend the authority of the Corps to require permits for the discharge of "pollutants" into many known types of water bodies – limiting jurisdiction to only "navigable" waters. *See* 33 U.S.C. §§1311(a), 1344(a), 1362(12).[5] Similarly, Congress excluded groundwater from the CWA's regulatory program after finding that including such waters would have involved the federal government in complex state jurisdictional rules. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). State regulatory programs in these reserved areas were to complement the mandatory regulatory programs that would be administered by federal agencies under sections 402 and 404 of the CWA. Accordingly, Congress also enacted section

[5]In turn, "navigable waters" are defined in section 502 of the CWA as "The waters of the United States." 33 U.S.C. §1362-(7).

208 to encourage the states to develop area-wide management plans that would address the pollution sources not regulated by federal law. *See* 33 U.S.C. §1288. Thus, Congress struck a careful balance – providing federal authority where necessary to protect federal interest in the health of "navigable waters," while preserving state authority in all other spheres.

The migratory bird rule eviscerates this careful balance, extending federal authority to include isolated, intrastate, seasonally wet areas that would otherwise remain in the exclusive control of state and local decisionmakers. Under our federal system, however, the Court does not allow this abrogation of local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (citation omitted).

As the Court explained in *Gregory v. Ashcroft*, 501 U.S. 452 (1991),

> our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . [in which] "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."

Id. at 457 (quoting *Texas v. White*, 68 U.S. (7 Wall.) 700, 725 (1869)).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, such as its power under the Commerce Clause, the Supremacy Clause allows Congress to trump state law, even in areas (such as land use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, the Court will not simply assume that Congress has used its power to override state authority. Rather, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to utilize the Commerce Clause to intrude into state interests. *See Gregory*, 501 U.S. at 464.

B. The Migratory Bird Rule Improperly Expands the Definition of Navigable Waters and Invades the Land Use Regulatory Authority of State and Local Agencies In Violation of the "Clear Statement" Principle.

The Corps utilizes the migratory bird rule to improperly expand the scope of federal regulatory authority to extend to isolated waters, such as manmade ponds and depressions excavated in uplands, seasonally wet drainage ditches and dry washes, and other remote, marginally wet areas. The Seventh Circuit's decision allows the Corps to assert jurisdiction over any wet area having no other connection to interstate commerce other than the *potential* presence of migratory birds and the "aggregate" impact of the "destruction of the natural habitat of migratory birds. . . ." Pet. App. 7a. The migratory bird rule goes well beyond the intended scope of the CWA, and invites unwarranted agency abuse where the public projects of

municipal and quasi-municipal agencies involve purely isolated, intrastate waters.

The Seventh Circuit reasoned that people spend money on hunting and bird-watching equipment and travel across state lines to view such birds. *Id.* This rationale, however, ignores the fact that Congress limited the scope of the CWA to "navigable waters" and, in turn, to "waters of the United States." 33 U.S.C. § §1344(a), 1362(7).[6] In effect, the migratory bird rule drops the key words "navigable" and "United States" and rewrites statutory authority to cover all "waters" based on any remote nexus to interstate or foreign commerce. Yet, as noted by the Fourth Circuit in *United States v. Wilson*, 133 F.2d 251, 257 (4th Cir. 1997), "the phrase 'waters of the United States' when used to define the phrase 'navigable waters' . . . refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters."[7]

The CWA does not provide the Corps with a "clear statement" that it possesses authority to assert jurisdiction over such isolated waters based on their potential use as migratory bird habitat. The Corps appears to believe, and the Seventh Circuit agreed, that it may bend the Commerce Clause in such a manner as to expand the

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[6] Without repeating the arguments of Petitioner, the *Amici* note that they concur with Petitioners' assertion that the Seventh Circuit improperly interpreted the Commerce Clause.

[7] Similarly, the validity of such broad interpretation of the Commerce Clause set forth in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) is questioned by Justice Thomas in a dissent from the denial of certiorari to review that decision, where Justice Thomas notes that the Ninth Circuit stretched the Commerce Clause "beyond the breaking point." *See Cargill Inc. v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J., dissenting from denial of certiorari).

definition of "waters of the United States" to cover isolated, intrastate waters and thus bootstrap itself into regulation of local affairs. However, "*Lopez* emphasized . . . that even under our modern expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. ___ (2000). The notion that Congress has provided a "clear statement" that the Corps's jurisdiction extends to isolated waters is belied by the limitation that the federal entities regulate solely "navigable" waters, and by sections 101's and 510's clear recognition of the primacy of state authority over intrastate land and water resource protection. A broad interpretation of statutory authority is not enough where Congress has not stated its intent to preempt state authority." *See City of Dallas, Texas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999). Congressional intent to alter the traditional constitutional balance between the states and the federal government must be "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In sum, the almost "limitness" expansion of federal authority inherent in the migratory bird rule allows the Corps to essentially arrogate federal power over state and local governments contrary to the express language of the CWA and fundamental principles of federalism. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (quoting L. Tribe, *American Constitutional Law* §6-25, 480 (2nd ed. 1988)).

C. The Seventh Circuit's Interpretation Could Have a Significant Adverse Effect on Vital Public Projects.

The ramifications of the Seventh Circuit's interpretation of the scope of the CWA are significant. The Seventh Circuit's decision could severely impact the process of decisionmaking for many vital projects sponsored by the *Amici*. The *Amici* bring together an alliance of regional water, highway and public works agencies, local and state governments, and private sector associations and companies that plan for and construct vital public works projects. The *Amici* are motivated by the increasing difficulty for state and local governments to deliver needed services affordably, efficiently, and on a timely basis, as a result of the nature and scope of various federal environmental laws. The role of public works agencies in providing services such as vital flood control, potable water, and maintenance of utility rights-of-way is severely hampered by the migratory bird rule and its triggering of the complex section 404 wetlands permit program. The Corps's expansion of jurisdiction to include all potential migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public works projects impacting isolated "wet areas" based on an alleged federal interest in the "aggregate" health of the Nation's migratory bird population.

The balefill project at issue in this case, where the denial of a section 404 permit halted a vital $20 million landfill, is but one example of the type of project that could be completely thwarted by the Corps's assertion of jurisdiction over local projects impacting purely intra-

state, isolated waters,[8] Indeed, national data in infrastructure funding reflects the greatly increased burdens on local governments. A 1999 report prepared by the Congressional Budget Office ("CBO") indicates that the percentage of federal dollars contributed to the construction, operation and maintenance of public infrastructure has been steadily decreasing. *See* CBO, *Trends in Public Infrastructure Spending* (May, 1999) <http://www.cbo.gov/byclasscat.cfm?class=0&cat=21>.[9] Stating that "public facilities, resources, and services known as infrastructure are vital to the nation's production and distribution of private economic output as well as to its citizens' overall quality of life," the report notes that in 1994 total public spending for infrastructure was $171 billion, but that the federal share of spending has decreased. *See id.* at 1. The analysis contained in the CBO report of spending on infrastructure relative to gross domestic product reveals increasing levels of responsibility placed on state and local governments to finance infrastructure. Since the late 1980s, "state and local governments have contributed approximate 75 percent of public infrastructure outlays, and current patterns of

[8] For example, in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), the Corps denied a section 404 permit for a 320 acre municipal landfill after over six years of extensive state and local reviews. A unanimous panel of the Ninth Circuit overturned the lower court, which had upheld the denial, and found that the Corps lacks authority to require a section 404 permit for a facility approved by the state under the Resources Conservation and Recovery Act, 42 U.S.C. §§6901-6992.

[9] The CBO report examines federal, state and local spending from 1956 through 1994 and estimates federal outlays through 2003 for eight types of infrastructure: highways, mass transit, rail, aviation, water transportation, water resources, water supply and wastewater treatment facilities.

spending maintain that trend." *Id.* at 2. While federal spending for highways is expected to increase, projected federal spending is expected to decrease by an average annual rate of 2.7 percent for all other categories of infrastructure throughout the 1998-2003 period. *See id.*

In light of the multitude of public services that state and local governments are now responsible for providing to their residents, state and local governments often must contract with or rely upon private entities to provide many of these services. Unfortunately, the Seventh Circuit's decision creates a disincentive for private entities to enter into such partnerships with public agencies. With the possibility that the federal government will assert jurisdiction over isolated wet spots due to the "aggregate" impact on interstate commerce of potential migratory bird use, private entities will be more hesitant to undertake contracts to provide essential public services. Even where private entities are willing to provide these services, they will have to increase the cost of the contracts in order to account for the risks and unpredictability flowing from possible assertion of jurisdiction by the Corps. Thus, the Seventh Circuit's decision unduly constrains the options of public entities in the current fiscal climate where public agencies are under increasing pressure to provide greater services with fewer resources.

To compound this problem, this decision has occurred at a time when federal jurisdiction under the CWA is becoming increasingly more onerous. In March 2000, the Corps made substantial changes to the "fast track" Nationwide Permit ("NWP") program under section 404 of the CWA; phasing out NWP 26 for impacts to isolated or headwaters areas and substituting five activity-specific nationwide permits. *See* Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg.

12,818 (March 9, 2000). Under the prior program, the *Amici* relied on NWP 26, which permitted discharges of up to 3 acres in certain "isolated" waters or "headwater" wetlands.[10] Thus, even where the Corps's jurisdiction over certain isolated waters was questionable, the more expedited nationwide permit program was available in many cases.[11] However, under the revised program, there is a maximum one-half (1/2) acre limit for impacts to "Waters of the United States" which includes "ephemeral streams."[12] Even where the new one half acre limit could be met, the use of the new NWP program is severely restricted for activities conducted within the 100-year floodplain. For example, the mining replacement permit (NWP 44) may not be used within the floodway of the 100-year floodplain, or within 100 feet of the ordinary high water mark of headwater streams where average annual flow is greater than 1 cubic foot per second.[13] A recent preliminary study by the National Aggregates Association indicates that 77 percent of respondents had one or more operations within the 100 year floodplain and 57 percent anticipated that they would be seeking a dredge and fill permit for activities within the 100 year floodplain within the next five years.[14] Thus, the floodplain restriction could severely impact aggregate production so necessary for the Nation's infrastructure.

[10]The Corps defines "headwaters" as "non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second." 33 C.F.R. §330.2(d). "Isolated waters" are defined as "those non-tidal waters of the United States that are: (1) Not part of a surface tributary system to interstate or navigable waters of the United States; and (2) Not adjacent to such tributary waterbodies." 33 C.F.R. §330.2(e).

[11]Corps data shows that more than 80% of the Corps permitting under section 404 fell under the NWP program. *See* U.S. Army Corps of Engineers Regulatory Branch, *Section 404 of the Clean Water Act and Wetlands, A Special Statistical Report*, July 1995.

[12]The Corps. defines an "ephemeral stream" as having "flowing water only during and for a short duration, after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." 65 Fed. Reg. at 12,897. An "ephemeral strema that meets the criteria at 43 C.F.R. part 328 is a water of the United States." *Id.* at 12,881.

The Seventh Circuit's decision will have a greater impact on public entities than otherwise would have been the case, due to the contemporaneous nature of the decision with the March 2000 changes to the NWP program. As a result, *Amici's* members will be subject to the far more onerous and time-consuming individual permit process under the CWA because many activities vital to the Nation's infrastructure, such as aggregate mining, flood control and stormwater management activities, impact floodplains with isolated ephemeral waters and have become ineligible for the NWP program.[15]

[13]*See* 40 Fed. Reg. at 12,892-893.

[14]*See* Therese Dunphy, *Corps' New Nationwide Permit Restrictions Leave Producers Very Little Room to Maneuver*, Aggregate Manager, June 2000, at 37.

[15]The individual permit process involves a detailed evaluation of whether a proposed discharge is in the "public interest." The Corps considers and balances many factors and must determine that there are no practicable alternatives to the proposed discharge, *see* 33 C.F.R. §322.4, and must also comply with EPA's detailed 404(b)(1) guidelines, *see* 40 C.F.R. §230. This involves individual public notices allowing for agency and public comment that must be considered before a permit may be issued. The Corps must prepare detailed findings to support its permit decision.

The Corps is well aware of the cost impacts of the changes to the NWP program. As required by the FY 2000 Energy and Water Development Appropriations Act, the Corps prepared a report for Congress estimating workload and costs impacts related to the increase in the number of individual permits that would be required as a result of the more stringent NWP requirements. The Corps estimated that the changes will result in an annual additional 4,429 individual permits, with $48 million in direct costs to the regulated public. *See* Letter from Joseph W. Westphal, Assistant Secretary of the Army (Civil Works) to the Honorable Pete V. Domenici, Chairman, Subcommittee on Energy and Water Development Committee on Appropriations United States Senate (May 22, 2000) <HTTP://www.usace.army.mil/inet/functions/cw/>. In a separate report, the National Association of Counties concluded that the changes will cost the general public an additional $300 million annually, or $100,000 per acre affected. *See* National Association of Counties, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (January 2000) (hereinafter NACO Report) <http://www.naco.org/leg/-Advocacy/corps.cfm>.[16] *Amici* submit that many of these costs will involve public projects and will ultimately be borne by taxpayers.

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[16]The recent Corps report reveals that the processing times for individual permits may increase dramatically under the new NWP program. For example, the Corps study indicates that in year five under the replacement permit program, processing times and backlogs are predicted to be more than four times the levels experienced in FY 98 with an average of 400 processing days per application. *See* Institute for Water Resources, U.S. Army Corps of Engineers, *Cost Analysis for the 1999 Proposal to Issue and Modify Nationwide Permit* 23 (2000) <http://www.usace.army.mil/inet/functions/cw/>. The report by the National Association of Counties indicates that it takes a total of 788 days to process an individual permit. *See* NACO Report, at 2.

II.
THE CORPS'S ARGUMENT THAT FEDERAL REGULATION IS NECESSARY TO PROTECT THE NATURAL HABITAT OF MIGRATORY BIRDS IGNORES STATE PROGRAMS THAT EXCEED THE CLEAN WATER ACT IN SCOPE.

The *Amici* recognize the legitimate objective of the section 404 program to protect the Nation's waters. However, these goals are not served where the areas to be regulated are isolated, seasonally wet areas that are already subject to state regulation. Fundamental principles of federalism dictate that control of isolated, intrastate waters is properly within the purview of state and local governments. The regulation of intrastate, isolated waters is the regular function of local governments in their administration of many ordinary land uses – from building new homes to renewal of past mining sites for the construction of public works projects. Indeed, the Court has recognized that "regulation of land use is perhaps the quintessential state activity." *See Federal Energy Regulatory Commisson v. Mississippi*, 456 U.S. 742, 768 n.30 (1980).

The CWA explicitly recognizes the fundamental principle of federalism, as recognized in *Gregory*, that there are not exclusive, but, rather, overlapping spheres of authority between the federal government and state and local governments. As noted above, section 101 of the CWA recognizes, preserves and protects "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. §1251(b), and section 510 notes that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States," 33 U.S.C. §1370.

Thus, the plain language of the CWA makes clear that it was Congress's intent to bestow "primary" responsibility upon the states to protect these water resources. The Corps's assertion of jurisdiction over isolated, intrastate waters, (and with that, over land use decisions), is inconsistent with this intent.

There are literally thousands of state and local governments that regulate wetlands and waters.[17] Accepting their key role in wetland protection, state and local governments throughout the Nation have passed comprehensive wetland laws, many of which are much broader in scope than the CWA section 404 program, and, therefore, offer far greater protection.[18] In fact, several states

[17] *See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), *available in* LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

[18] On April 19, 2000, Virginia enacted new legislation for the protection of state waters and wetlands. *See* Va. Code Ann. §§61.1-44.3-44.29 (2000). The law prohibits the discharge of "sewage, industrial wastes, other wastes, or any noxious or deleterious substances" into "state waters" ("state waters" is defined as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands"). *Id.* §62.1-44.3, 44.5; *see also* Conn. Gen. Stat. §§22a-36 to -45 (1994); Fla. Stat. Ann. §§ 373.414-421 (West 1995); Me. Rev. Stat. Ann. Tit. 38, §§480-A to -U (West 1994); Mass. Gen. Laws Ann. Ch. 131, §§40, 40A (West 1994); Mich. Comp. Laws §281.701-722 (1994); Min. Stat. §103G.222-2242 (1994); N.H. Rev. Stat. Ann. §482-A:1-:27 (1994); N.J. Rev. Stat. §13:9B-1 to -30 (1994); N.Y. Envtl. Conserv. Law §§24-0101-1301 (Consol. 1994); Pa. Stat. Ann. Tit. 25, §105.17 (1993); R.I. Gen. Laws §§2-1-18 to 24 (1994); Vt. Stat. Ann. Tit. 10, §1272 (1994). For a thorough survey of state wetland laws, *see generally* William L. Want, *Law of Wetland Regulation* (1992).

began regulating these areas well before the federal government took interest. "The first wetlands protection statute in the United States was passed in Massachusetts in 1963 . . . By the time Congress enacted the CWA in 1972, Massachusetts had nine years of experience regulating wetlands, and was already reforming its laws to provide greater local control and accountability while maintaining state-level oversight." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtr. L. 1, 48 (1999).[19]

Since the enactment of the CWA, many states have enacted legislation within far greater reach than the federal program. For example, 17 states (including Illinois) have laws furnishing protection for freshwater wetlands,[20] while other states have shoreline and coastal zone protection programs.[21] Illinois, in fact, prohibits the discharge of contaminants into the "waters of the State", which is broadly defined to include "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are

[19] *See also* Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands*, in *Wetland Protection: Strengthening the Role of the States* 225 (Association of State Wetland Managers ed., 1985).

[20] *See* 415 Ill. Comp. Stat. 5/11 (West 2000). The other states include: Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, and Wyomong; *See* Jon A. Kusler et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, 2 (Association of State Wetland Managers ed., 1994).

[21] These states include: Washington, Wisconsin, Delaware and California, among others. *See id.* at 3.

wholly or partially within, flow through, or border upon this State." 415 Ill. Comp. Stat. 5/3.56 (West 2000).

Maryland is an excellent example of a state that has a regulatory regime that goes beyond the 404 program, having enacted one of the first state laws declaring a goal of "no net overall loss in nontidal wetland acreage and function and to strive for a net resource gain in nontidal wetlands over present conditions." *See* MD. Code Ann., Envir. §5-902 (1996). In addition, Maryland's comprehensive wetland legislation brings the following areas within its jurisdiction:

> both surface and underground waters within the boundaries of the state . . . all ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the state, other than those designated and used to collect, convey, or dispose of sanitary sewage; and the floodplain of free-flowing waters determined by the Department on the basis of the 100-year flood frequency.

MD. Code Ann., Envir. §5-102. This broad definition of the "Waters of the State" allows for the protection of waters extending well beyond the reach of the federal program.

In turn, the state of California regulates its waters through the federal CWA, supplemented by the California Porter-Cologne Water Quality Control Act "Porter-Cologne" or "Act"). *See* Cal. Water Code §§13000-14958. California's act broadly defines "Waters of the State" as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code §13050. Labeling itself as the "nation's first statewide comprehensive wetlands program," the California Wetlands Conservation Policy establishes a framework and strategy to: (1) ensure no overall net loss and

achieve a long-term gain in the quantity, quality, and permanence of wetlands in California; (2) reduce procedural complexity in the administration of State and federal wetlands programs; and (3) encourage partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration. *See* California Environmental Protection Agency, *State of the State's Wetlands* (1998).

As a final example, the Florida State Water Resource Plan defines "Water"or "waters in the state" in the following manner:

> any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.

Fla. Stat. Ann. §373-019. Again, with such a broad scope of jurisdiction, the waters protected by the state regulators far exceed the federal program.

Indeed, the EPA has recognized the essential role of federalism in the protection of wetlands and other waters, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[22]

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[22] U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the*

[footnote continued]

Moreover, the CWA establishes parallel regimes by which states can obtain authorization to administer the permitting programs under sections 402 and 404 of the Act. *See* CWA section 404, 33 U.S.C. §1344(g). To date, two states have actually assumed the 404 program. *See* 40 C.F.R. §233.70 (Michigan), and 40 C.F.R. §233.71 (New Jersey).

With literally thousands of local governments already regulating wetlands, there are ample state and local protections of isolated waters in place to facilitate more creative and, therefore, less burdensome regulatory schemes than under the federal program.[23] The domination of federal authority over isolated, intrastate waters could quash the policy innovation of the state and local governments and interfere with their expertise in local land use issues.

Moreover, state protection of isolated waters is further enhanced by state regulation covering activities that would escape regulations as "discharges" under section 404 of the CWA, especially non-point source pollution:

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under the [CWA]. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms. . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be

Section 404 Permit Program (May 25, 1999) <http:/www.epa.gov/owow/wetlands/facts/fact23.html>.

[23] As Justice Kennedy noted, state and local jurisdictions "perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581.

> prevented, controlled, or abated adequately by these means.

Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution*, 1 (1998). All fifty states, the District of Columbia, and the Commonwealth of Puerto Rico have laws that can apply to nonpoint source discharges. *See id.*

In sum, precluding federal regulation of isolated, intrastate waters does not mean that these areas will escape regulation. To the contrary, there is ample state and local authority to protect these areas for their various functions, including migratory bird use.

CONCLUSION

The *Amici* Nationwide Public Projects Coalition *et al.* respectfully request this Court to reverse the Seventh Circuit's ruling upholding the migratory bird rule. That ruling adversely affects the public projects community and sanctions the Corps's intrusion into areas traditionally reserved for state and local governments.

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In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs: *e.g.*, Reynolds, *Kids, Guns and the Commerce Clause: Is the Court Ready for Constitutional Government?* Cato Policy Analysis No. 216, Oct. 10, 1994; R. Pilon, *Restoring Constitutional Government*, Cato's Letter No. 9, 1995; "The Court Rediscovers Federalism: Is It the Real Thing?" Policy Forum featuring Ronald D. Rotunda and Lyle Denniston, Sept. 17, 1999. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or counsel contributed money or services to the preparation or submission of this brief.

The Institute for Justice is a nonprofit public interest legal center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is guaranteeing that Congress be limited to its enumerated powers under Article I, Section Eight of the United States Constitution.

FACTUAL SUMMARY

This case arises from the efforts of the Solid Waste Agency of Northern Cook County (the "Agency"), a public entity, to develop a site for "bale-fill" waste disposal. The Agency purchased 500 acres of land to establish a bale-fill after the Corps of Engineers told the Agency that the Corps claimed no jurisdiction over the land. Later, the Corps asserted jurisdiction over isolated waters dispersed among 17 acres.

The Agency obtained all necessary county and state approvals. However, the Corps of Engineers denied the Agency a permit. That denial rested upon the determination that certain migratory birds might at some time alight upon open pools of water, including "prairie potholes" as defined in 33 C.F.R. § 328.3(a)(3), known to form, from time to time, on the property.

These potholes can be as small as 1/10 of an acre in size (or less than the area of 1/10 of one football field – from the goal line to the 10-yard line), sometimes only two inches deep, seasonal (depending on the rainfall), and connect to no other

waterway. These potholes appear and disappear, and the exact same pothole may never reappear. The waters in those potholes are not navigable and not capable of becoming navigable by reasonable effort. There is no evidence in the record before the Court that any migratory birds actually ever used these waters. Pet. for Cert. at 6 n.3.

The Corps of Engineers therefore asserted that there was federal jurisdiction to bar use of the land for the Agency's purpose, based on the Clean Water Act, the Corps' regulations, and ultimately on the Commerce Clause of the Constitution.

The Agency now petitions the Court to rule that the Commerce Clause does not empower the Congress to regulate the use of land like the Agency's intended parcel, located entirely intrastate, with no existing connection to navigable waterways or likelihood of becoming so connected, solely on the basis of entirely speculative migratory bird landings, when the federal government has not met its burden to demonstrate any substantial relation to "commerce among the states."

ARGUMENT

I. THERE ARE LIMITS TO THE FEDERAL COMMERCE POWER.

In deciding cases of fundamental constitutional interpretation, the Court "starts with first principles," chief among which is the principle that the "Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Federalism and the

enumeration of federal powers were principles "adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Enumeration can serve that function, however, only as long as the powers enumerated are themselves understood as limited. Should one or a few prove to be effectively unlimited, enumeration becomes an empty promise.

This is a principle of longstanding, which James Madison emphasized in Federalist No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45 (quoted in *Lopez*, 514 U.S. at 552). Scholarly commentators agree with this principle. 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 3.3 at 346 (3d ed. 1999) ("It must never be forgotten that the federal government is one of enumerated powers and that it does not possess a general police power."); 1 Laurence H. Tribe, American Constitutional Law § 5-1 at 789 (3d ed. 2000) ("It is noteworthy that Article I, § 1 endows Congress not with 'all legislative power,' but only with the 'legislative powers herein granted.'").

That principle applies, of course, to the Commerce Clause, found in Article I, Section 8, giving Congress the power to regulate that portion of commerce – that is, trade – that takes place with foreign nations, among the several states, and with the Indian tribes. U.S. Const. art. I, §8. "[T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the

power to every description." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (quoted in *United States v. Morrison*, 120 S. Ct. 1740, 1753 n.7 (2000)). As but one of the several powers delegated to Congress, it must be understood in that context. In particular, it cannot be understood in a way that would render those other powers superfluous. *Morrison*, 120 S. Ct. at 1754 n.8 ("the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *see also* 1 L. Tribe, *supra*, § 5-2 at 795-96 ("the Constitution, in granting congressional power, thus simultaneously limits it: *an act of Congress is invalid unless it is affirmatively authorized in the Constitution.*") (emphasis original) (citing to *Lopez*, 514 U.S. 549).

The scope of the commerce power must therefore be understood to have limits. All nine justices of the present Court have agreed on this much. *Lopez*, 514 U.S. at 556-57 (Rehnquist, C.J.) (even the most expansive of the Court's Commerce Clause precedents confirm "that this power is subject to outer limits."); *id.* at 580 (Kennedy, J., concurring) (Court has a "duty to recognize meaningful limits on the commerce power of Congress."); *id.* at 584 (Thomas, J., concurring) ("our cases are quite clear that there are real limits to federal power"); *id.* at 615-16 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (recognizing the "distinction of what is national and what is local," and the inability of the federal government to regulate "marriage, divorce, and child custody," or any and all aspects of education).

A government that can regulate virtually anything and everything is not a limited government.

> Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. ... Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring); *see also United States v. Morrison*, 120 S. Ct. 1740, 1759 (Thomas, J., concurring). The Court in *Morrison* held that Congress cannot regulate noneconomic activities (*e.g.*, sexual assault) simply because the activity, when aggregated, may have a substantial effect on commerce. If someone trips and falls, and thereby rips a hole in his trousers, that does not mean that Congress may regulate every slip and fall case in the United States simply because, if one adds them all together, they affect tailoring costs, and those costs affect commerce in the amount of threads and needles that cross state lines. May the federal government accordingly assert environmental jurisdiction over every pothole in the United States, simply because, after a rainfall, some birds might use the potholes for drinking?

If the federal power to regulate interstate commerce is to be limited to its stated ends, it cannot reach matters that are not commerce, or commerce that is not interstate. "The Constitution requires a distinction between what is truly national and what is truly local." *United States v. Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 568; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *cf.* 1 Rotunda & Nowak, *supra*, § 4.9 at 459 ("Federal regulation of single state activities that are not commercial in character will not be upheld unless the federal government can demonstrate to the Court that there is a factual basis for the conclusion that the single state activities, as a class, have a substantial effect on interstate commerce."). "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

II. THE ASSERTION OF JURISDICITION IN THIS CASE EXCEEDS THE LIMITS ON THE FEDERAL INTERSTATE COMMERCE POWER.

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall set forth the Court's clear duty upon review of a federal statute challenged as exceeding Congress's authority.

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of

> executing its powers, pass laws for the accomplishment of objects not entrusted to the [federal] government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

17 U.S. at 423. Respondents justify the present statute as an act to regulate interstate commerce. But "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 120 S. Ct. at 1752; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring). "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (quoted in *Lopez*, 514 U.S. at 557 n.2). The Court of Appeals below wrongly assumed the Corps of Engineer's assertion to be true, rather than looking for factual support in the record and making the necessary judicial determination. 191 F.3d at 849.

Chief Justice Marshall definitively wrote in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 196 (1824), "Commerce ... is intercourse," and the "power to regulate" means "to prescribe the rule by which commerce is to be governed." In other words, commerce entails the deliberate and purposeful interaction of goods and people in trade, navigation,

communication and movement. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 326 (1851) (Daniel, J., concurring) ("The power delegated to Congress by the Constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced"). Commerce is human activity, not the independent migrations of wild birds -- which are no more amenable to rules and governance in crossing State lines than are weather fronts and storms.

The power to regulate commerce also necessarily encompasses the attendant means of commerce, the instrumentalities, channels, or avenues in which it takes place. It is this second attendant category of commerce regulation that is the purported basis for the Corps of Engineers to assert jurisdiction over the Agency's land. Yet none of the parties contends that the Agency would engage in a deliberate movement of people or goods in commerce across state lines.

Without any relation to commerce among the states, there is no basis for federal jurisdiction to regulate the challenged activity. "[T]he express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 44 (1869). "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers

clearly granted to the legislature." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 470-71 (1866); *Gibbons*, 22 U.S. (9 Wheat.) at 194-95 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States ....") (quoted in *Morrison*, 120 S. Ct. at 1753 n.7).

In distinguishing the truly national from the truly local, the Court is aware that "some activities may be so private or so local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce." *Hodel*, 452 U.S. at 310 (emphasis original). The lower court, acknowledging this distinction, agreed that the Agency should prevail if "the protection of migratory bird habitat is a matter of local concern only." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 851 (7th Cir. 1999).

The present case concerns the assertion of jurisdiction, under the Commerce Clause, by the Army Corps of Engineers, which historically has been charged with improving domestic, commercial navigation. Consistent with its role to develop and maintain the nation's inland waterways, the Corps of Engineers is granted jurisdiction over the "navigable waters of the United States." 33 U.S.C. § 1362(7); *cf. United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (cited in *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975) ("The commerce clause vests power in Congress to regulate all waters navigable in interstate or foreign

commerce.")). But that jurisdiction cannot exceed the limits of the Commerce Clause, and accordingly it must be shown to concern actual and truly interstate commerce in order to pass constitutional scrutiny.

> Public navigable waters --
> constitute navigable waters of the United States within the meaning of the acts of Congress, *in contradistinction from the navigable waters of the States*, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.

The Daniel Ball, 77 U.S. 557, 563 (1870) (emphasis added).

Otherwise, "there is undoubtedly an internal commerce which is subject to the control of the States." *Id.* The "waters" appearing on the Agency's land do not support transportation, nor do they connect with other waterways, actual or potential. These are in fact puddles and pools formed in recesses of land once strip-mined and now reclaimed to new use.

In *Lopez*, the Court drew a line barring congressional regulation of local intrastate activity that was not economic in itself. *See* 1 L. Tribe, *supra*, § 5-4 at 819 (Court focused "on the *nature of the underlying activity* – paying particular attention to whether or not that activity could itself be described as part of an economic enterprise") (emphasis original). It is difficult, if not impossible, to see how the occasional or speculated alightings of

migratory birds in seasonal pools and puddles on open land constitute "commerce." *Cf. Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978) (Blackmun, J.) (holding Privileges and Immunities Clause "not isolated from the Commerce Clause," and challenged disparity in hunting license fees for residents and nonresidents did not affect commerce where "Elk hunting ... is a recreation and a sport. ... It is not a means to the nonresident's livelihood. ... [and] The elk supply ... has been entrusted to the care of the State by the people of Montana.").

The Commerce Clause does not justify congressional use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (Harlan, J.); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) ("where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power"); *cf. Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (Sentelle, Cir. J.) (Potential crop loss due to insects insufficient basis to justify Comptroller of the Currency's assertion of federal power under national bank act).

Nothing about the subject Congress tried to regulate in this case was truly commerce, nor was it interstate. The isolation of the waters in question from any connection to waterways or channels capable or potentially capable of transport or travel

excludes them from the federal commerce power.[2] *See Adams*, 528 F.2d at 440 ("No purpose is served by application of a uniform body of federal law, on waters devoid of trade and commerce").

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[2] This is not to say that Congress might not act with regard to migratory birds on another constitutional basis. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari) ("I do not challenge Congress's power to preserve migratory birds and their habitat through legitimate means."). Congress has sufficient power, when there is an actual problem that the States could not themselves handle, or requires a uniform national solution (*e.g.*, over-hunting and the elimination of animals that do pass in interstate trade), to act when it has met its burden of proof. But that is not this case.

CONCLUSION

The decision of the Court of Appeals should be reversed. The Government has not met its burden of proof in this case.

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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OTHER AUTHORITIES

J. Blanding Holman IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?* 15 VA. ENVTL. L. REV. 139 (1995) 14

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INTEREST OF AMICUS CURIAE

There are countless intrastate wetlands in this country that have no connection at all with interstate waters nor any substantial (or, in many cases, any) connection to commerce, but are nonetheless subject to federal regulation under the "migratory bird rule." The rule – purportedly grounded on federal Commerce Clause power and adopted without notice and comment procedures required by the Administrative Procedures Act – is an expansive, and really limitless, federal arrogation of traditional state authority over land use. For a bird might at some time alight anywhere, potentially subjecting almost any landowner to federal supervision of land use, exposure to citizen suit, and $27,500 per-day penalties, regardless of any connection of the site to interstate waters or commerce. The rule exceeds federal power and leads to absurd results that have no basis in environmental or commercial policy.

Perhaps no one knows that better than amicus Cargill, Incorporated ("Cargill").[1] Cargill's property was the subject of the first appellate decisions – by the Ninth Circuit – applying the migratory bird rule and upholding it against constitutional attack. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (*"Leslie I"*); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) (*"Leslie II"*). The subsequent cases finding the rule constitutional

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[1] Under Rule 37.3(a), the parties have consented to the filing of this *amicus curiae* brief. Letters evidencing that consent are on file in the Clerk's office. This brief has been written only by counsel for Cargill, and Cargill alone has provided the funds for its preparation and submission. S. Ct. R. 37.6.

– including the Seventh Circuit's decision here[2] – look, in turn, to that Ninth Circuit decision. Cargill has twice sought this Court's review of the rule's constitutionality. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

We respectfully submit that Cargill's experience provides important insight into the absurd extremes to which this rule can be taken, and the mischief – bereft of Commerce Clause justification or environmental benefit – it can wreak. For this reason, Cargill submits this brief as amicus curiae, to put the rule and its (ab)use in context.

SUMMARY OF ARGUMENT

The migratory bird rule extends federal CWA jurisdiction to isolated intrastate waters based solely on the use or potential use of those sites by migratory birds. The rule purports to be grounded in federal Commerce Clause power, but as the experience of Cargill and others shows, the rule is based on fictions about attenuated effects on commerce and in practice is used to extend federal power to sites regardless of any real interstate commerce connection. The rule has been used, for example, to exert federal authority over temporary rainwater

[2] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 191 F.3d 845, 851 (7th Cir. 1999) ("it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds") (*citing Leslie* cases).

collections within artificially-created former solar evaporation ponds; to impose liability and a million-dollar fee award on Cargill in connection with discharges into a fully-contained waste treatment system that allegedly is polluting itself; and to inject federal authorities into local land use matters because of the presence of "wetlands" little bigger than a placemat, or based not on actual bird use but a presumption that any site below the Pacific flyway is subject to CWA jurisdiction. In practical effect, since a migratory bird can alight almost anywhere, the rule has no limit.

The rule rests on the reasoning that reduction of bird habitat reduces birdwatching and hunting, which in turn may affect spending by interstate travelers for those activities, which in turn may affect commerce. But the Court has never endorsed federal regulation of non-commercial activity based on such an attenuated "but-for" chain, and the Court's recent decisions in *Lopez*[3] and *Morrison*[4] reject even less attenuated rationales. In Justice Thomas's words, the migratory bird rule stretches the Commerce Clause power "beyond the breaking point." *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J. dissenting from denial of certiorari). The Court should hold the rule unconstitutional.

[3] *United States v. Lopez*, 514 U.S. 549 (1995).

[4] *United States v. Morrison*, ___ U.S. ___, 120 S. Ct. 1740 (2000).

ARGUMENT

I. THE EXTREME USES OF THE MIGRATORY BIRD RULE

Cargill and others have seen an expansive assertion of CWA jurisdiction based on the migratory bird rule, divorced from any finding that that activity at the regulated site itself affects commerce (or that the regulation benefits the environment).

A. Cargill's Experience: A Paradigm Of Excess.

Cargill is the successor of Leslie Salt Co. As a consequence, it is the largest private landowner in the San Francisco Bay Area, owning some 17,000 acres and holding a perpetual right for salt-making and related uses over an additional 12,000 acres. Cargill makes salt on much of the acreage, by the process of solar evaporation and precipitation. It is a benign land use, and one that has protected much of the land surrounding the Bay from development, and provides extraordinarily rich habitat for many animal species.

Over the course of 25 years Cargill has seen ever-expanding claims by the Corps and environmental groups of CWA jurisdiction over Cargill's property. Initially, the focus was upon the interrelationship between the CWA Amendments of 1972 (33 U.S.C. §§ 1311(a), 1344(a), 1362(12) and 1362(7)) and the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, *et seq.*), under which the Corps had historically exercised regulatory authority over navigable waters of the United States. *See Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra*

Club v. Leslie Salt Co., 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

In 1986, the Corps and the U.S. Environmental Protection Agency ("EPA"), adopted the "migratory bird rule." *See* 53 Fed. Reg. 20763, 20765. Since then, the Corps, EPA and various non-governmental groups have used the rule to expand CWA jurisdiction and federal control over Cargill's operations and land use. The agencies claimed jurisdiction beyond the true waters that had been the basis for jurisdictional claims before the rule's adoption, and asserted CWA authority over facilities Cargill itself had made, based not on any commercial character of the activity sought to be regulated, but solely on the sites' use or potential use by migratory birds.

1. The First Assertion Of Migratory Bird Rule Jurisdiction: Over An Isolated Artificially-Created Seasonal Pond.

The Corps first asserted regulatory jurisdiction under the migratory bird rule over a section of Cargill's Newark, California salt-production facility. The 12.5 acre site had been a crystalization pond, made by Cargill, that was neither part of nor adjacent to navigable waters, and had no hydrologic connection (surface or otherwise) to any navigable water. It was no longer used for solar salt production, and had no colorable connection to commerce. But in winter and spring "rainwater create[d] temporary ponds" where the human-made crystalization pond had been (*Leslie II*, 55 F.3d at 1391), and migratory birds used them.

The district court found that the periodic collections of rainwater were so temporary and ephemeral that they

did not constitute a waterbody, much less a "water of the United States" that could be subject to the CWA. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-486 (N.D. Cal. 1988). The Ninth Circuit, however, reversed in a divided decision. The majority held, without analysis, that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds. . . . " *Leslie I*, 896 F.2d at 360. In dissent, Judge Rymer held that the CWA did not extend to isolated ponds with "no hydrological connection with any other body of water," and that Congress did not mean the "Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as habitat." 896 F.2d at 361 & n.1. The Ninth Circuit remanded the case to the district court for findings on the extent of temporary ponding and migratory bird use.

After the trial court found bird use and consequent CWA authority, the case went again to the Ninth Circuit, where Cargill again challenged the constitutionality of the migratory bird rule. The Ninth Circuit affirmed, holding that an isolated, artificially-created, non-commercial, seasonally ponded and intrastate site was subject to full CWA regulation. The Ninth Circuit reasoned (without considering *Lopez*, which this Court had decided a few weeks before) that because loss of bird habitat affects birdwatchers and hunters, who travel and spend money in their pursuits, which in turn affects commerce, the migratory bird rule – though it "certainly tests the limits of Congress's commerce power and, some would argue, the bounds of reason" – was constitutional:

> The migratory bird rule certainly tests the limits of Congress's commerce power and, some would argue, the bounds of reason. In this case there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the [court's prior holding finding the rule constitutional in *Leslie I*] cannot be considered clearly erroneous on this ground.

Leslie II, 55 F.3d at 1396. The court used the "clearly erroneous" language because it held it was constrained by law of the case to adhere to the holding of *Leslie I* unless it was "clearly wrong." The Court noted, however, that if it were "considering the issue for the first time, Cargill's arguments might well deserve closer consideration." 55 F.3d at 1395.

Thus a one-sentence holding without analysis morphed into law of the case despite this Court's supervening *Lopez* decision and despite the Ninth Circuit's own misgivings; that in turn became the foundation for the circuit court case law upholding the migratory bird rule against constitutional attack.

Cargill, as successor to Leslie Salt Co., petitioned this Court for a writ of certiorari to review the Ninth Circuit's decision in *Leslie II*. Justice Thomas dissented from denial of review, stating that federal jurisdiction over a site that "rests entirely on the actual or potential presence of migratory birds" stretches the Commerce Clause power "beyond the breaking point." *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995).

2. The Application Of CWA To A Waste Treatment System That Was Allegedly Polluting Itself.

In 1996, on the strength of *Leslie I* and *Leslie II*, two environmentl groups (San Francisco BayKeeper and Citizens Committee to Complete the Refuge) sued Cargill for alleged CWA violations with respect to a different site in Cargill's salt-making operations – a waste treatment system.

Decades before, Cargill's predecessor, Leslie Salt Co., had created a contained area surrounded by levees of impervious Bay mud and for decades deposited salt-making residues at the 17-acre site, where it was dried and contained. The site was dry or almost dry much of the time, and saline material covered the whole site. Cargill distributed the material unevenly so there was a higher area and a lower elevation (covering some 5 acres) where leachate and runoff liquid could pool and evaporate. The site has been saline-saturated, with no vegetation, since the 1970s, before the CWA even arguably applied to the site. There was no evidence that the deposit of additional saline material since the 1970s has reduced migratory bird use (if any) of the site – not surprising, since saline-saturated is saline-saturated.

In 1979, the U.S. condemned over 15,000 acres – about half Cargill's salt-making acreage – for inclusion in the San Francisco Bay National Wildlife Refuge. (ER 89-100) The site was included not because of any habitat value but because the U.S. needed the adjoining levee and road for access to other portions of the refuge bayward of the levee road. The government knew what

the site was, and granted to Cargill the right to continue to use all the acquired lands for salt-making and related activities.

The Site did not harm the Bay or the nearby slough and wetlands. To the contrary, its whole purpose was to contain all saline runoff and ensure that the adjacent area remained fine wildlife habitat. Even that habitat had no affect on commerce through birdwatching; the individual whose interests supposedly were being protected by the citizen groups admitted she does not "normally recreate in the [area] because it is closed to recreational use . . . " Excerpt of Record at 293, 298, 329, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (pending before 9th Cir.).

Nonetheless, the citizen groups – whose members did not use or visit the site – charged that Cargill was violating the CWA because the waste treatment system was polluting itself, and sought an injunction, penalties and attorneys fees. The theory went like this: the site's higher elevation was a "pile"; brine leached from material deposited on the "pile" or was created by rainwater runoff picking up brine on the "pile"; the brine ran down to and collected in the lower elevations, which the suit called a "pond"; although the site had no vegetation and was often dry, when brine was pooled in the "pond" it contained brine flies and brine shrimp and was sometimes pecked at by migratory birds when their real habitat (the nearby slough and wetlands) was submerged at high tide; so the brine "pond" (while simultaneously being the pollutant) was a "water of the U.S."; and accordingly the site was polluting itself in violation of the CWA.

"The district court – the same judge that had rejected CWA jurisdiction and been reversed in *Leslie I* and *Leslie II* – felt constrained to find the "pond" a "water of the U.S." under the migratory bird rule, and so granted summary judgment for plaintiffs. But the court said application of the CWA to the Site – while perhaps compelled "by the definitions of the Ninth Circuit and the definitions of the regulations" – "doesn't make any practical sense":

> So I believe that the requirements of the regulation are satisfied; that the jurisdictional requirements of being a water of the United States, both under the regulations and under the two Ninth Circuit cases, does satisfy the requirements of being a water of the United States. [¶] That may not be terribly practical. When we have an industrial facility obviously moving around water, moving around salts, producing salt, big wide flat areas obviously with some depressions in them where water can collect or where they've been leveed off for one purpose or another, it doesn't make any practical sense to say, 'Well, we'll take a small area of this and water gets in it, so we define it as a water of the United States.' [¶] Maybe it doesn't, but I have to be governed by the definitions of the Ninth Circuit and the definitions of the regulations, and I think this battle got fought out at least four times in the *Leslie Salt* litigation and that's twice before me and twice before the Ninth Circuit.

Excerpt of Record at 313-14, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (decision of Legge, J.; appeal pending before Ninth Circuit). Indeed, the Court said flat-out that there was "not much environmental value to this property," and that the case was "simply too much litigation over too little." Excerpt of Record (Fees) at 89-91, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (decision of Legge, J., pending before Ninth Circuit). Cargill has appealed the district court's summary judgment to the Ninth Circuit, challenging the citizen groups' standing, the validity of the migratory bird rule generally, and also its application to this site. *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032.[5]

The *BayKeeper* case is an example of how the migratory bird rule, bereft of real moorings in commerce, has drifted beyond legitimate Commerce Clause power, and indeed, has been used to torture the CWA itself.[6] The CWA is intended to protect the nation's navigable waters. The site in the *BayKeeper* case does that, by design; it contains and treats waste so none of it – none – discharges to the nearby slough, wetlands, or the Bay. The public (whose money spent birdwatching and hunting ostensibly is aggregated to justify the rule) does not go to those areas, much less to the site itself, and suffers no degradation of birdwatching opportunities elsewhere because the site protects, not harms, bird habitat. Yet the migratory bird rule has been held to apply and, ironically,

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[5] Among other things, Cargill challenges the plaintiffs' standing to bring suit, the court's decision on summary judgment that this is not a "waste treatment system" exempt from the definition of "waters of the United States" and therefore not subject to the CWA under 40 C.F.R. § 122.2, and the finding as a matter of law that there is sufficient bird use when the facts are disputed.

[6] We believe the CWA's legislative history indeed forecloses the rule, but leave that issue to others to brief.

to subject Cargill to injunction and worse for activities that protect, not harm, the environment.

B. Cargill's Experience Is Not Isolated: Other Absurd Assertions Of Jurisdiction Under The Migratory Bird Rule.

Isolated waters are found all over the countryside, and so are the regulatory excesses of the migratory bird rule. A few anecdotes from California illustrate the problem.

On a 523-acre site near Lincoln, California, the Corps found hundreds of isolated "wetlands," as small as 1/10,000 of an acre (4.365 square feet), strewn over the site. Letter from Tom Coe, Chief, Regulatory Unit 1, Sacramento District, Corps of Engineers, to Tom Skordal, Huffman and Associates, and accompanying map (Jan. 4, 1990) (Corps File No. 8900059). The 4.365 square foot wetlands – that's about two feet by two feet – were deemed by the Corps to be "waters of the United States" and subject to full CWA jurisdiction. *Id.* No one can seriously claim that a site little bigger than a placemat has any real effect, much less a direct and substantial one, on commerce. And there is nothing in the rule that limits CWA coverage to placemats; it could equally cover sites as small as napkins. The limit of the rule, it appears, is the area a bird might alight.

In California, EPA has even suggested to the Corps that the Corps assert jurisdiction under the migratory bird rule despite the "lack of actual sightings of birds" at a site. *See* Letter from Harry Seraydarian, Director, Water Management Division, Region IX, EPA, to Colonel Galen

H. Yanagihara, District Engineer, San Francisco District, Corps of Engineers (March 14, 1989). EPA reasoned that even if "actual use" of vernal pools "is not yet documented," the pools "are within the Pacific Flyway," which alone justifies assertion of jurisdiction. *Id.* Thus, EPA has taken the position that in much of California a presumption – not even real bird use – can establish CWA jurisdiction. In practical effect, that means every wet spot in the Bay Area is subject to federal control.

Together, these examples reveal the truth about the migratory bird rule. It really is not tethered to commerce at all. It has been invoked to confer federal jurisdiction over an abandoned artificial crystalizer with no commercial effect, to supposedly self-polluting brine in a contained waste treatment system designed to protect real water; over sites little bigger than a placemat; and indeed, to justify a presumption of jurisdiction over all land beneath the Pacific Flyway regardless of any bird use (and so any even theoretical attenuated commerce connection). Thus, at least in some areas of California EPA says the rule permits a presumption – not even real bird use – to be a proxy for bird use, which in turn is a proxy for birdwatcher interest, which in turn is a proxy for birdwatcher spending, which in turn is a proxy for interstate commerce effect.

If that is within the Commerce Clause's limits, there are no limits. We know of no case that defines Commerce Clause power so broadly, and no case should. To the contrary, the Court's recent Commerce Clause holdings condemn such sweeping assertions of federal power divorced from real and direct commercial impact. We turn to that.

II. THE MIGRATORY BIRD RULE EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE.

The flight of migratory birds across state lines is not itself interstate commerce; indeed, "the birds obviously do not engage in commerce. Until they are watched, shot at or otherwise impacted by people who do . . . engage in interstate commerce, migratory birds do not ignite the Commerce Clause." J. Blanding Holman IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack*? 15 VA. ENVTL. L. REV. 139 (1995).

Neither the Corps nor the lower courts purport to ground the migratory bird rule on federal power to directly regulate commerce. They base the rule on the "aggregate effects" principle: the idea that activity that may not alone justify exercise of federal power may be regulated if "viewed in the aggregate [it] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 561 (1995). *See, e.g., SWANCC*, 191 F.3d at 850 ("[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds," so "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires."). *See also Leslie*

II, 55 F.3d at 1395-96 ("millions of people annually spend more than a billion dollars a year on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many bird species and consequently the ability of people to hunt, trap and observe these birds.") (*quoting Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993)).

We respectfully submit that to uphold federal power under the migratory bird rule, the Court would have to adopt an attenuated "aggregate effects" analysis that expands the Commerce Power beyond where it ever has gone before – really beyond any limit – and impinges on the fundamental rights of states to regulate intrastate land use matters.

A. The Recent Cases Confining The "Aggregate Effects" Principle To Regulated Activities That Are Themselves Commercial.

In a pair of recent cases, the Court has resisted efforts to expand the "aggregate effects" principle to federalize matters that are really local.

In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act despite the government's argument that gun possession near a school constitutes an activity, "which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. 549, 561 (1995). The Court first observed that Congress' criminal statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id*. Further, the Court noted that "section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme

could be undercut unless the intrastate activity were regulated." *Id.* As a result, the Court concluded that the statute "cannot, therefore, be sustained under our cases upholding regulations" based on an aggregate effects analysis. *Id.* "Even *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." 514 U.S. at 560.

Lopez provided a second, independent rationale for striking down the Gun-Free School Zones Act. It held that an assertion of Commerce Clause power by the federal government must contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." 514 U.S. at 562, *citing United States v. Bass*, 404 U.S. 336, 337 (1971) (interpreting a statute prohibiting gun possession and transport in commerce or affecting commerce to demand an additional nexus to interstate commerce in an individual defendant's case). The statute in *Lopez* failed the Commerce Clause test because not only did the government refuse to provide a nexus to commerce in the statute's application in that case, but "the statute [itself] has no jurisdictional element that might limit its reach to [conduct] that additionally ha[s] an explicit connection with or effect on interstate commerce." *Id.*

Just last term the Court reinforced *Lopez*'s limits on the use of aggregate effects analysis when the Court struck down a section of the Violence Against Women Act. *United States v. Morrison*, 120 S. Ct. 1740 (2000). The Court rejected the law that gave a federal right of action

to women victims of gender-based violence, notwithstanding Congress' heavily documented findings about the effects of gender-based violence on commerce. The Court noted that "in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." 120 S. Ct. at 1750 n. 4. Although the Court did not need to adopt a "categorical rule" to decide the cases before it, it strongly suggested that the "aggregate effects" principle should be confined to aggregation of regulated activities that are themselves commercial.

> While we need not adopt a categorical rule against aggregating effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

120 S. Ct. at 1751.

Morrison also affirmed *Lopez's* command that a statute must require in each instance of its application an explicit nexus to interstate commerce. *See* 120 S. Ct. at 1750-51. The Court observed that "the second consideration that we found important in analyzing [the statute at issue in *Lopez*] was that 'the statute contained no express jurisdictional element which might limit its reach.' " *Id.* at 1751, *citing Lopez*, 514 U.S. at 562. The Violence Against Women Act, "like the Gun-Free School Zones Act, . . . contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." 120 S. Ct. at 1751. Consequently, the Court struck down the statute as

a regulation of "purely intrastate" activity. 120 S. Ct. at 1752.

Thus, *Lopez* and *Morrison* mandate that a federal law grounded in federal commerce power: (1) cannot be based on attenuated "aggregate effects" of regulated activities that are not themselves commercial; and (2) must include a "jurisdictional element which would ensure, through case-by-case inquiry," that the activity sought to be regulated "affects interstate commerce" (*Lopez*, 514 U.S. at 562).

B. The Court Should Not Expand The "Aggregate Effects" Principle To Obliterate Any Limit On Federal Commerce Clause Power.

We submit that the migratory bird rule cannot survive *Lopez* and *Morrison*. Adopted without notice or comment,[7] the rule is supported by no data or findings on the effects of local use of intrastate isolated waters on commerce. There is on the face of the rule no requirement that the regulated activity at any particular site be commercial, or that anyone seeking to apply the CWA to a particular site prove the activity there has any effect at all on commerce, even indirectly. The rule is the opposite. On its face, the rule does not purport to regulate economic activity, but to regulate discharge (economic or not) into intrastate water bodies that merely "would" be (not are) bird habitat and so "could" (not do) affect interstate

[7] We believe that the rule was adopted in violation of the requirements of the Administrative Procedures Act, but leave that issue to others to brief.

commerce, however minutely or indirectly. It applies regardless whether any migratory birds at a site have attracted out-of-state human visitors, whether bird watchers, duck hunters or anyone else.

Indeed, the rule apparently applies even to sites – like the artificially created waste treatment system in Cargill's *BayKeeper* case – that receive no out-of-state human visitors because the sites are closed or uninteresting to them. In fact, the rule, in importing the definition of "migratory birds" from 50 C.F.R. § 10.13 (1999), does not require that the birds at a site be unusual, or even, for that matter, migratory, to subject the site to CWA regulation. For example, the ubiquitous redwing blackbird is on the list of birds whose presence permits exercise of federal CWA regulation (*id.*), even though people really don't travel interstate to see redwing blackbirds. The rule has been used to assume federal jurisdiction over placemat-size puddles, and indeed, EPA by presumption to all land beneath the Pacific Flyway, without respect to bird use (much less commercial implications of it) at any site. The rule thus ensures that most any site in the country where water can pool and a bird could alight, even briefly, is covered by the CWA regardless whether it has any real interest or value to birdwatchers or other visitors, much less real commercial impact.[8]

Thus, the migratory bird rule cannot meet the test for aggregation that historically has been applied, much less the separate demand for "case-by-case inquiry[ ] that the

[8] Indeed, the rule is so broad it conceivably could apply to backyard puddles or even swimming pools, if the right (or wrong) bird decides to hang out there.

[activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 562. The Corps is not seeking to regulate aggregated "intrastate activity . . . where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751. Thus, the Corps' rule can survive only if the Court (1) dispenses with the need for "case-by-case inquiry" into real commercial effects; and (2) expands the "aggregate effects" principle to include lengthy "but-for" causal chains of fictions: filling or discharging into an intrastate site (which may or may not be economic activity) may affect the habitat of some migratory bird (though it might not really be migratory), which in turn may affect people who travel interstate to watch or hunt birds (though they might not travel to watch that bird, much less at that site), which (if other such sites were aggregated) may affect their interstate spending to watch or hunt birds, which in turn may affect interstate commerce.

Lopez and *Morrison* condemn that. *Lopez* rejected as too "attenuated" the government's arguments that violent crime "imposes substantial economic costs," "reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe," and "poses a threat to the educational process, which in turn produces a less efficient and productive workforce." 514 U.S. at 563-64. Similarly, *Morrison* condemned as "unworkable" a but-for justification for federalizing gender-based crime, even if supported by data showing that such crime reduces people's willingness to travel across state lines. *Morrison*, 120 S. Ct. at 1751. Both cases condemned federal regulation of conduct where there is no assurance case-by-case that the conduct at issue has a commercial effect. Indeed, as *Morrison* explains, if "every

attenuated effect upon interstate commerce" justified federalizing matters of traditional state concern (there, criminal law), then federal law could regulate not only "every crime," but "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." 120 S. Ct. at 1752-53.

Activity found to itself affect interstate commerce may be a proper subject for federal regulation based on Commerce Clause power. But fictions about interstate commerce and attenuated commercial effects offend the Commerce Clause's limits. Land-use regulation is, like the criminal law, an area traditionally left to the states. *See Village of Belle Terre v. Borras*, 416 U.S. 1, 10 (1974). It should no more be usurped by attenuated (and really unsupported) claims of federal commerce interest than the local interest in crime control. Indeed, this is, if anything, an *a fortiori* case. A child's time in a local school, or a woman's safety from violent crime, is more directly and obviously linked to her economic productivity (and so, to commerce) than is a migratory bird's potential use of an isolated intrastate site linked to hypothetical interstate bird watching and trapping (and so, after several more but-for links, to commerce). *See Cargill, Inc. v. United States*, 516 U.S. 955, 957-958 (1995) (Thomas, J., dissenting from denial of certiorari) ("the basis asserted [the migratory bird rule] to create federal jurisdiction over Petitioners' land in this case seems to me to be more farfetched than that offered, and rejected, in *Lopez*"). And the migratory bird rule is not supported even by the kind of "aggregate effects" data found wanting as a basis for the Act in *Morrison*. Isolated intrastate waters – especially

those, like Cargill's, made by people, not nature – that have no direct or substantial commercial affect should be regulated by local government, not by Washington.

Again, Cargill's experience here is instructive. It has twice had its property found subject to CWA jurisdiction with no finding that the activity regulated had any effect on commerce. Indeed, it was subjected to CWA liability and $1 million in fees with respect to activity at an isolated site that for decades has contained and treated waste and been too saline saturated to be real habitat, but is that way precisely so other nearby habitat can thrive. No remedy the CWA permits will improve bird habitat; the site itself will be saline-saturated even under the injunction ordered, and the nearby wetlands are already pristine and vibrant with life. No interstate traveler goes to the site, nor even the nearby wetland, for birdwatching because the area is not open to the public. No discharge or filling by Cargill at the Site would have any effect on birds, much less interstate commerce. We respectfully submit that CWA and the Commerce Clause were never intended to confer federal jurisdiction over such a site.

CONCLUSION

If the "aggregate effects" analysis the Seventh Circuit used to support the migratory bird rule could put the rule within the Commerce Clause's limits, we submit there are no limits. The Court should not read the limits of the

Commerce Clause power out of the Constitution. The decision of the Court of Appeals should be reversed.

DATED: July 27, 2000

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In The

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

BRIEF OF AMICUS CURIAE NATIONAL STONE ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "migratory bird rule" can be used lawfully to apply the federal "dredge or fill" permit program to isolated mining ponds that are not connected to navigable waters of the United States.

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INTEREST OF AMICUS CURIAE

The National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates and sand and gravel industries, including more than 700 member companies and approximately 120,000 working men and women. NSA has not issued shares or debt securities to the public.

On July 18, 2000, NSA announced ratification of plans for merger with the National Aggregates Association. The merger is expected to be consummated by September 30, 2000. Members of the merged organization will produce more than 90% of the crushed stone and 70% of the sand and gravel produced in the United States. During 1999, a total of about 2.7 billion metric tons of crushed stone and sand and gravel, valued at $13.7 billion, were produced and shipped in the United States. Pursuant to Supreme Court rule 37.3(a), this Brief is accompanied by the written consent of the parties.[1]

STATEMENT OF THE CASE

This case illustrates the problems and perils of extending the federal "dredge or fill" permit program to isolated intrastate waters historically reserved for state

[1] Other attorneys at O'Connor & Hannan are counsel to Petitioners in this case. However, no counsel for a party authored this brief in whole or in part, and no person or entity other than NSA made a monetary contribution to the preparation and submission of this brief. Counsel for NSA recently joined O'Connor & Hannan, effective April 15, 2000.

regulation. The Petitioner, a municipal solid waste agency, proposed to construct a balefill on a former gravel mining site. The site included trenches and depressions from the prior mining activity that became permanent or seasonal ponds upon collection of rainwater. Upon hearing that state conservation staff had observed migratory birds on the property, the Army Corps of Engineers invoked the "migratory bird rule" to require a fill permit under Clean Water Act Section 404 (33 U.S.C. § 1344). The Corps concluded that the isolated ponds were "navigable waters of the United States" subject to Section 404 permit requirements because they are used as habitat by migratory birds. Alleging that the fill activities would destroy the habitat, the Corps ultimately denied the permit, blocking construction of the balefill. An efficient local land use decision, under which an economically stagnant and unproductive property could be managed to produce revenue and serve a vital community need, was effectively overridden by a federal policy that Congress never mentioned when it enacted the Section 404 permit program.

Beneath this case lies a widespread potential for disruption in the mining community, and related state land use programs, if the migratory bird rule can be used to apply the Section 404 permit program to isolated mining waters. Surface mining necessarily involves creation of pits, ponds, trenches, ditches and other excavations that become partially filled with rainwater but have no connection to natural wetlands or navigable waters. There are approximately 10,000 crushed stone or sand and gravel mining sites in the United States, each of which contains at least one pond or other excavation potentially

subject to the migratory bird rule (and often many more).[2] Dredge or fill activities often are necessary to support mining operations, and active surface mines are not a suitable habitat for migratory birds. Upon completion of mining operations, the site typically is reclaimed under state law and post-mining uses consistent with reclamation requirements are then determined. In many instances, wetlands are retained or created and the land does become a habitat for migratory birds. In other cases, different post-mining land uses are chosen, such as the balefill at issue here.[3] Mining and post-mining land use decisions historically have been reserved for state and local land use planning authorities.

The migratory bird rule can be an unwarranted but effective tool for overruling state mining policies and stopping new or expanded mining operations, because it is used to assert permitting jurisdiction over dredge or fill activities involving virtually any isolated pool of water where migratory birds might conceivably land. Once jurisdiction is claimed, a permit can be denied based on the circular logic that the contemplated activities would destroy the potential habitat. The rule also can inhibit post-mining land use and value – as it did in this case – by subjecting future activities to the Section 404 permitting requirements. Informal assertion of the rule often is sufficient to kill a mining or post-mining project as a

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[2] This does not include coal, metal or other mining sites also potentially subject to the rule.

[3] Another example is the ski resort complex at Park City, Utah, a major venue for the upcoming Winter Olympic Games in 2002. The Park City area is a former mining district.

result of the time and expense added by permit proceedings or jurisdictional challenges. In the end, the careful decisions of state legislatures and land use planning authorities with respect to use of mined and mineable land are superceded by the will of the Corps.

SUMMARY OF ARGUMENT

There is no statutory or constitutional basis for applying the migratory bird rule to require Section 404 permits for dredge or fill activities at isolated mining ponds. Congress clearly restricted the program to the navigable waters of the United States, and justified the program under the Commerce Clause as necessary to protect water quality in those waters. There is no indication of any congressional intent, nor is there any constitutional justification, for broader application of the program.

In extending the Section 404 program beyond its statutory and constitutional bounds, the Corps is impinging on State authority to conduct mining and post-mining land use planning. State laws and policies governing use of mineable land and post-mining land uses can be overridden by a federal mandate to convert the land into a bird sanctuary. Congress never intended any such result, and it is clearly inconsistent with this Court's decisions interpreting the Commerce Clause.

For these reasons, explained further below, NSA respectfully requests the Court to make it clear that the migratory bird rule cannot be used to extend the Section

404 program to isolated mining waters that have no connection to navigable waters of the United States.

ARGUMENT

I. THERE IS NO STATUTORY OR CONSTITUTIONAL BASIS FOR APPLYING THE MIGRATORY BIRD RULE TO ISOLATED PONDS AT MINING OPERATIONS

A. Statutory Authority

As discussed at length in Petitioner's Brief, the Corps' jurisdiction under Section 404 of the Clean Water Act is limited to "waters of the United States" that are "navigable." Though Congress and this Court have extended this jurisdiction beyond waters that are "navigable in fact," the Corps has not been given *carte blanche* to regulate isolated ponds with no connection to navigable waters.

The Clean Water Act is aimed at "major waterways" such as a "river, lake, stream or ocean."[4] Congress intended to encompass not only these waters, but also their tributaries and other waters that could be made navigable "with reasonable improvement." See, e.g., 2 Legis. Hist. at 1495 (1972 Senate Report), 1 Legis. Hist. at

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[4] S. Rep. No. 414, 92d Cong., 2d Sess. 7 (1972) (discussing Senate Committee findings), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1 at 1425 (1973) [hereinafter "Legis. Hist."].

250 (remarks of Rep. Dingell on conference bill). Relying in part on this legislative history, this Court has held that the Act extends to wetlands adjacent to navigable waters because those wetlands "play a key role in protecting and enhancing water quality" in the navigable waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985).[5] In that case, however, the Court expressly declined – twice – to address whether the Act extends to isolated wetlands or other water bodies not capable of affecting the quality of navigable waters (474 U.S. at 124 n.2, 131-32 n.8). Nothing in the Act or its legislative history supports such an extension. See *United States v. Wilson*, 133 F.3d 251, 255-56 (4th Cir. 1997) (Corps jurisdiction does not extend to intrastate nonnavigable waters); 33 C.F.R. § 329.4 (navigable waters are those "susceptible for use to transport interstate or foreign commerce"). The Corps itself has admitted that on at least one occasion. See 45 Fed. Reg. 33290, 33398 (1980) (isolated wet areas not navigable waters; no need to exempt them from Corps regulations).

Clearly, Congress never intended to regulate mining ponds as navigable waters of the United States. Where necessary, discharges *from* mining ponds *into* navigable waters are regulated under Sections 301, 304 and 402 of

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[5] The remarks of Rep. Dingell cited above, which also were cited by this Court in *Riverside Bayview Homes*, provide a detailed example of congressional intent on this issue (474 U.S. at 133). Mr. Dingell cited 12 judicial precedents, each of which involves a body of water that was used or could be used as a link in the chain of waterborne commerce among the states. Most of the cases focus on once navigable waters that were no longer navigable as a result of obstructions.

the Act (33 U.S.C. §§ 1311, 1314, 1342).[6] Mining ponds are not regulated as navigable waters themselves. The Act also includes special provisions for mine water control that include no suggestion of regulation as "navigable waters" under Section 404 (see 33 U.S.C. §§ 1257, 1257a).[7] In yet another provision, the Act indicates that mine water may be regulated if necessary in areawide waste-water management plans, again making no mention of potential regulation under Section 404. See 33 U.S.C. § 1288(b)(2)(G) (2000); 1 Legis. Hist. at 299 (1972 Conference Report); 2 Legis. Hist. at 1454-58 (1972 Senate Report).

The Corps recently recognized that mining ponds are not navigable waters of the United States. In proposing a new "nationwide permit" (NWP) for mining operations last year, the Corps proposed the following language on jurisdictional issues:

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[6] See 40 C.F.R. §§ 434 (effluent limitations for coal mining); 436 (mineral mining and processing); 440 (ore mining and dressing) (2000). The legislative history indicates that Congress intended for EPA to address activities involving mining ponds, including dredge and fill activities, in the "information and guidelines" published under Section 304 as the basis for the effluent limitations. See 1 Legis. Hist. at 307 (1972 Conference Report); 796 (1972 House Report); 2 Legis. Hist. at 1470-71 (1972 Senate Report). Cf. *Fertilizer Institute, Inc. v. EPA*, 935 F.2d 1303, 1310 (D.C. Cir. 1991) (discharge *into* "unenclosed containment structures" not a "release into the environment" under CERCLA).

[7] See also 1 Legis. Hist at 772 (1972 House Report); 2 Legis. Hist. at 1438 (1972 Senate Report). Both reports discuss a number of mine water control initiatives, none of which mentions Section 404 regulation.

Water-filled depressions (e.g., pits, ponds, etc.) created in any area not previously considered a "water of the United States," as a result of mining, processing, and reclamation activities, shall not be considered a "water of the United States" until one of the following situations occurs:

(1) All construction, mining, excavation, processing, and reclamation activities have been ceased and the affected site has been fully reclaimed pursuant to an approved reclamation plan; or

(2) The resulting body of water and adjacent wetlands meet the definition of "waters of the United States" (see 33 C.F.R. Part 328.3(a)) and any one of the following criteria are met:

(a) all construction, mining, excavation, processing and reclamation activities have ceased for a period of five (5) consecutive years;

(b) the property is no longer zoned for mineral extraction; or

(c) the same or successive operators are not actively mining on contiguous properties; or

(d) reclamation bonding, if required, is no longer in place. 64 Fed. Reg. 39336-337 (July 21, 1999).

However, in the final NWP rule, the Corps withdrew this proposed jurisdictional clarification, raising once again the specter of Section 404 regulation of isolated mining ponds under the migratory bird rule or other jurisdictional interpretations. See 65 Fed. Reg. 12860 (March 9, 2000).

Mine waters are fully regulated under other provisions of the Act, and there is no indication that Congress intended to regulate them under Section 404. Further, the Section 404 program does not apply to isolated waters that are not connected to navigable waters of the United States. Accordingly, isolated mining ponds cannot be swept into the Section 404 program under the migratory bird rule. This is so not only for statutory reasons, but from a constitutional perspective as well, for reasons to which we now turn.

B. Constitutional Authority

The court below found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). As we have seen, however, it is more accurate to say that the Act reaches as many "navigable waters of the United States" as the Commerce Clause allows. This reveals a fundamental flaw in the Seventh Circuit's analysis of the constitutional issues.

The court began its analysis by citing this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995) for the proposition that a federal statute based on the Commerce Clause must serve one of three principles: (1) regulation of the channels of interstate commerce; (2) regulation of the instrumentalities of interstate commerce, or persons or things in commerce; or (3) regulation of activities that "substantially affect" interstate commerce (191 F.2d 849). The court went on to analyze the migratory bird rule under the third principle. *But that*

entirely misses the point that Congress justified the Section 404 program solely under the first principle. As discussed above (and in much greater detail in Petitioner's Brief), the program was enacted to regulate water quality in the navigable waters of the United States. There was no discussion whatsoever of any other intent that might support a broader application under the migratory bird rule or any other constitutional theory, and that should be the end of the inquiry here.

This becomes clear upon attempting to justify the migratory bird rule under the "substantial effect" test of the third principle. Again, the court cites *Lopez* for a three-pronged inquiry as to whether the rule is justified by a "substantial relation" to interstate commerce: (1) is there a substantial aggregate interstate economic effect; (2) is there a "jurisdictional element" that ensures case-by-case inquiry into effects on interstate commerce; and (3) are there express congressional findings with respect to effects on interstate commerce? Yet the opinion provides no detailed discussion of these factors (191 F.3d at 849-51). And in this case, the last two questions can be answered summarily. Yes, there is a clear jurisdictional element, and it restricts the Section 404 program to the navigable waters of the United States. Yes, there are express congressional findings, and they are limited to protection of water quality in the navigable waters of the United States. Had the court focused on how *Congress justified* the Section 404 program, rather than on how *the court* thought the program *could be justified*, it could not

possibly have upheld application of the migratory bird rule to isolated mining ponds.[8]

This leads to further problems in the court's discussion of the aggregate interstate economic effect of the rule, vividly illustrated in the case of isolated waters at mining operations. According to the Seventh Circuit, the migratory bird rule is justified because millions of people spend billions of dollars hunting, trapping and observing migratory birds, and the cumulative loss of wetlands has hindered these activities by reducing species populations (191 F.3d at 850). But dredge or fill activities at mining excavations not connected to wetlands or navigable waters have nothing to do with loss of natural wetland habitats. Ponds at active mining operations generally are not desirable as habitat. Nor are mining facilities appropriate places for hunting, trapping or bird watching activities. Indeed, most (if not all) state mining statutes include public safety provisions intended in part to *prevent* such activities at mining operations.[9]

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[8] See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (it is *Congress'* justification of the nexus to interstate commerce that the Court must review).

[9] See, e.g., Utah Code Ann. § 40-8-7(1)(j) (2000) (mining operations must be conducted "so as to minimize or prevent hazards to public safety"); Utah Admin. Code R647-2-109, R647-3-109, R647-4-111 (2000) (warning signs, fences, barriers or berms required where necessary); accord., O.C.G.A. 12-4-71 (2000); GA Admin. Code 391-3-3.08 (2000); 45 I.L.C.S. 50/1.1 (Interstate Mining Compact); 62 Ill. Admin. Code 1816.133 (2000).

Application of the migratory bird rule to mining ponds is not necessary to advance the interstate economic interests cited by the Seventh Circuit and undermines the sound public policy of encouraging safety at mining operations. Here, as in *Lopez*, the link between the migratory bird rule and a substantial effect on interstate commerce, if any, is simply too "attenuated." *United States v. Morrison*, 120 S.Ct. 1740, 1751 (2000). As the Court stated in *Lopez*:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states . . . This we are unwilling to do (514 U.S. at 567-68).

In this case, Congress has not even purported to exercise its authority in such a manner. Clearly, use of the migratory bird rule to extend the Section 404 program to isolated mining waters cannot be justified under the *Lopez* and *Morrison* decisions.

II. THE MIGRATORY BIRD RULE USURPS STATE AUTHORITY TO CONDUCT MINING LAND USE PLANNING

The migratory bird rule can turn mines into bird sanctuaries. If migratory birds are observed at a mining site, it becomes a potential habitat. It is then subject to the Section 404 permit program, and permits necessary for further mining or post-mining activities are likely to be

denied to avoid destruction of the "habitat." Active mining operations must cease, and state decisions on reclamation requirements and post-mining land uses are effectively overruled by the Corps' determination that the site must become a habitat for migratory birds.

This case illustrates these problems clearly. State land use planners had decided to convert a former mining site into a municipal balefill. An economically stagnant and unproductive property could thus be used to produce revenue and serve a vital community need. Clearly, this was a win-win situation from the local public interest perspective, with no perceptible downside. Yet it was negated through application of the migratory bird rule, and the site has essentially become a sanctuary for migratory birds that few, if any, venture to hunt or observe.

This flies in the face of long-standing state policies governing mining operations, mined land reclamation and post-mining land use. For example, the Utah legislature has enacted a comprehensive Mined Land and Reclamation Act based on a finding that responsible mining and post-mining activities are "essential to the economic and physical well-being of the state and the nation." Utah Code Ann. § 40-8-2, *et seq.* (2000). The same is true in Georgia, where the legislature has recognized that mining activity provides significant economic benefits to the state and should be encouraged in a manner consistent with protection of public health, safety and welfare. See O.C.G.A. 12-4-71 (2000). Nevada has adopted a similar statutory scheme. See Nev. Rev. Stat. Ann. Title 46, Chapter 519a (2000). Each of these statutory programs provides comprehensive state regulation of mining operations, post-mining reclamation and subsequent land

use. Virtually all states with significant mining activity have adopted similar programs.

Sixteen states have adopted the Interstate Mining Compact, which declares that mining is "of basic significance" to the economies and the well-being of the signatory states, recognizes that the states have primary responsibility to assure sound mining and post-mining practices, and establishes policies and procedures for attaining that goal.[10] The Compact states the following findings and purposes, among others:

- The effects of mining on the availability of land, water and other resources for other uses present special problems which properly can be approached only with due consideration for the rights and interests of those engaged in mining, those using or proposing to use these resources for other purposes, and the public.

- Such variables as soil structure and composition, physiography, climatic conditions, and the needs of the public make impracticable the application to all mining areas of a single standard for the conservation, adaptation, or

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[10] The states are Illinois (45 I.L.C.S. § 50/1.1), Indiana (Ind. Code Ann. Title 14, Ch. 4), Kentucky (K.R.S. § 350.300), Louisiana (La. R. S. 15-901), Maryland (Md. Nat. Res. Code Title 7, Subtitle 7), Missouri (R.S. Mo. § 444.400), North Carolina (N.C. Gen. Stat. § 74-37), Ohio (O.R.C.Ann. § 1514.30), Oklahoma (45 Okl. Stat. § 851), Pennsylvania (52 P.S. § 3252), South Carolina (S.C. Code Ann. § 48-21-10), Tennessee (Tenn. Code Ann. § 59-10-101), Texas (Tex. Nat. Res. Code § 132.001), Virginia (Va. Code Ann. § 45.1-271), West Virginia (W.Va. Code § 22C-10-1) and Wyoming (Wyo. Stat. § 30-4-101).

restoration of mined land, or the development of mineral and other natural resources.

- The States are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions.

- The Compact is intended to assist the party States in their efforts to facilitate the use of land and other resources affected by mining, so that such use may be consistent with sound land use, public health, and public safety, and to this end to study and recommend, wherever desirable, techniques for the improvement, restoration or protection of such land and other resources.

- The Compact is intended to assist in achieving and maintaining an efficient and productive mining industry and in increasing economic and other benefits attributable to mining.

The ultimate effect of the migratory bird rule is to supplant these state programs and policy choices with a federal mandate based on protection of migratory birds. Even if the rule, as applied to isolated mining ponds, had a reasonable relationship to this goal – which it does not – and even if Congress had intended to apply the Section 404 program in this manner – which it did not – there would *still* be significant constitutional problems with this approach. Quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), the *Lopez* Court stated:

> In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual

> system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and created a completely centralized government." 514 U.S. at 557; accord, *U.S. v. Morrison*, 120 S.Ct. at 1748-49; *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. at 307-313 (Rehnquist, J., concurring).

This is precisely the effect of the migratory bird rule on state mining and reclamation programs affecting approximately 10,000 mining sites in the crushed stone and sand and gravel industries alone.

And it is clear that no such effect was intended, or even contemplated, when Congress adopted the Section 404 program. As discussed above, there is no indication that Congress intended to extend the program beyond the navigable waters of the United States. Further, Clean Water Act Section 101 provides:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and the rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . (33 U.S.C. § 1251(b)).

Congress has spoken clearly on these issues. Neither the Clean Water Act nor its legislative history provides any authority for Section 404 regulation of isolated mining waters, and the Act expressly reserves related land use decisions to the states. The states have exercised their

authority through enactment of comprehensive mining and post-mining land use laws. The migratory bird rule cannot be applied in any manner that intrudes upon state primacy in these areas.

CONCLUSION

Congress never intended to extend the Section 404 permit program to isolated mining ponds, and there is no constitutional justification for any such extension. Application of the program in such a manner causes impermissible federal intrusion into state authority to conduct mining and post-mining land use planning, potentially affecting as many as 10,000 crushed stone or sand and gravel mining sites in the United States. The Court's opinion in this case should make it clear that the migratory bird rule cannot be applied in any manner that extends the Section 404 permit program to isolated mining waters that are not connected to navigable waters of the United States.

Respectfully submitted;

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FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NORTH DAKOTA FARM BUREAU IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

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123 Cong. Rec. 26,722 (1977) 14

123 Cong. Rec. 38,997 (1977) 12

123 Cong. Rec. 39,210 - 39,211 (1977) 13

Economic Research Serv., U.S. Dep't of Agric., *Land Use, Value, and Management Q & A's*, (visited July 24, 2000), <http://www.ers.usda.gov/briefing/landuse/ruseqa6.htm> 8

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With the written consent of the parties, reflected in letters on file with the Clerk, the American Farm Bureau Federation, National Cattlemen's Beef Association and North Dakota Farm Bureau respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation ("AFBF") is a voluntary, general, farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois.[2] The AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. The AFBF has member organizations in 50 states and in Puerto Rico, representing more than 4.9 million member families. AFBF's policies, adopted by the voting delegates of the member state Farm Bureaus to AFBF's annual meeting, provide, in relevant part, as follows: "Isolated wetlands (vernal pools, etc.) not connected to navigable

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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than *amici* and their members have made a monetary contribution to the preparation or submission of the brief.

[2] The Cook County Farm Bureau, DuPage County Farm Bureau and Kane County Farm Bureau, which are affiliated with the Illinois Farm Bureau, do not support AFBF's participation in this brief due to their opposition to the location of the proposed landfill on the Solid Waste Agency of Northern Cook County ("SWANCC") site.

waterways, should not be subject to regulation under the Clean Water Act."

Initiated in 1898, the National Cattlemen's Beef Association ("NCBA") is the marketing organization and trade association for America's one million cattle farmers and ranchers, all of whom have a stake in maintaining a strong livestock industry which is essential to the nation's economic stability, the viability of many rural communities and the sustainability of a healthful and high-quality food supply for the American public. With offices in Denver and Washington, D.C., NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry.

The North Dakota Farm Bureau ("NDFB") is one of the 51 organizational members of the AFBF. The NDFB is a voluntary, general farm organization incorporated in North Dakota in 1942. The NDFB is a non-profit organization which fosters the mission of the AFBF on the local level. With member organizations in 50 counties, the NDFB serves 26,500 members.

American farmers and ranchers own or lease hundreds of millions of acres of private and public agricultural and ranch lands, producing food, fiber and livestock for themselves, other Americans and world-wide consumers. While American farmers and ranchers have the highest production rates in the world, multiple layers of restrictive regulations at the local, state and national levels have impaired their ability to farm and ranch efficiently in an increasingly competitive global market. In some instances, the regulatory burden has become too

much to bear, bankrupting farmers and ranchers whose families have been in these industries for generations and forcing sale of their real and personal property.

The United States Army Corps of Engineers' ("Corps") expansive interpretation of its authority places millions of acres of agricultural lands within its regulatory stranglehold. The Corps' questionable assertion of jurisdiction over isolated, intrastate waters under the Clean Water Act ("CWA") and the Commerce Clause threatens to place another extraordinary and unreasonable burden on farmers and ranchers. Accordingly, *amici* submit this brief detailing the deleterious effects of the Corps' misguided attempt to regulate isolated, intrastate waters.

SUMMARY OF THE ARGUMENT

The issue before the Court is whether the Corps' assertion of jurisdiction over isolated, intrastate waters which are, or would be, used by migratory birds impermissibly expands its authority under the CWA or the Commerce Clause.

The CWA authorizes the Corps to exercise limited jurisdiction over navigable and connected waters. However, under the migratory bird rule rationale the Corps applied in the immediate case, the Corps' asserted jurisdiction is limitless. The Corps' assertion of jurisdiction under the migratory bird rule places an undue burden on the private property of farmers and ranchers without Congressional authority. There are millions of isolated, intrastate pools, ponds and depressions filled with water on an intermittent basis located on farm and ranch lands which could appeal to

migratory birds as habitat or resting places. As a result, the Corps could assert its jurisdiction over millions of acres of isolated, intrastate waters on lands owned, leased and operated by farmers and ranchers, but nowhere near any navigable waters. The migratory bird rule threatens normal farming and ranching activities by reducing farmers' and ranchers' ability to produce food, fiber and livestock efficiently, without undue regulatory interference.

The Commerce Clause does not support the Corps' assertion of jurisdiction over isolated, intrastate waters on the basis that they are or have the potential to be migratory bird habitat. The discharge of dredged or fill material into isolated, intrastate waters has absolutely no effect on or connection with interstate commerce. The Corps' reliance on the interstate flight habits, habitat and human exploitation of migratory birds does not provide the necessary nexus for federal regulation of isolated, intrastate waters.

If the Corps' attenuated Commerce Clause argument is accepted, land use planning, an area of regulation traditionally within state and local jurisdiction, will be usurped. Federal land use regulation of isolated, intrastate waters, without consideration of local exigencies, can only impair farmers' and ranchers' productivity.

The Corps' extension of its jurisdiction to isolated, intrastate waters under its migratory bird rule is an unreasonable and over-zealous interpretation of its authority under the CWA and the Constitution's Commerce Clause. Such an interpretation significantly threatens farmers' and

ranchers' productivity. Congress did not intend the Corps' authority under the CWA to extend to any and all waters of the United States deemed suitable, or potentially suitable, as habitat by migratory birds, particularly if such waters were located on productive farm and ranch lands.

ARGUMENT

I. THE CWA DOES NOT AUTHORIZE THE CORPS' JURISDICTION OVER MIGRATORY BIRDS' HABITAT IN ISOLATED, INTRASTATE WATERS.

The migratory bird rule merely represents the latest chapter in the Corps' usurpation of Congressional authority to amend the CWA. The Corps has expanded its CWA authority to cover *all* waters rather than only those which are navigable or connected or adjacent to such waters. As discussed below, the Corps' assertion of such overly broad jurisdiction contravenes the intent of Congress as expressed in the CWA and subjects farmers and ranchers to unprecedented and unwarranted federal regulatory intrusion.

The CWA grants the Corps broad but not unlimited regulatory jurisdiction. Section 404 of the CWA requires a permit for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Navigable waters are defined as "waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). While the plain language of the CWA grants the Corps jurisdiction over waters that are navigable, this Court has determined that CWA jurisdictional waters include navigable waters and those connected or adjacent to such waters. *United*

States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

The Corps has defined "waters of the United States" generously to include:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

33 C.F.R. § 328.3(a)(3) (1999).

In the preamble to the Corps' regulations published in 1986, the Corps expanded the definition of "other waters" to include waters

> a. [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. [w]hich are or would be used as habitat by other migratory birds which cross state lines. . . .

51 Fed. Reg. 41,206, 41,217 (1986).

The Corps thus asserted jurisdiction over isolated, intrastate waters by virtue of administrative fiat. Indeed, the Corps did not even promulgate the migratory bird rule in accordance

with the Administrative Procedure Act. 5 U.S.C. § 553.[3]

In the event the Corps' interpretation of its jurisdiction over isolated, intrastate waters under the migratory bird rule is accepted, the ability of farmers and ranchers to produce crops and livestock

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[3] As a result, the Fourth Circuit Court of Appeals struck down the migratory bird rule in 1989. *Tabb Lakes v. United States*, 715 F. Supp. 726, *aff'd*, 885 F.2d 866 (4th Cir. 1989). The Fourth Circuit affirmed the district court's conclusion that the contents of the migratory bird rule required prior notice and opportunity to comment.

The Court of Appeals for the District of Columbia recently rejected a similar attempt at regulatory "ukase" in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court rejected attempts by the Environmental Protection Agency to enforce agency guidelines without going through statutory notice and comment requirements. The court held, "It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Id.* at 1024. In the case at bar, the Corps seeks to escape statutory requirements by promulgating a regulation as a preamble. The CWA does not give the Corps a "roving commission" to regulate all isolated, intrastate waters, and then to inquire into evils and upon discovery, correct them. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935)(Cardozo, J., concurring); *Appalachian Power Co.*, 208 F.3d at 1026.

in the United States will be impaired. The productivity of farm and ranch land in the United States has increased significantly during the past two decades. With the increase in productivity, the demand for new farm and ranch land has decreased, thereby decreasing the demand by farmers and ranchers to convert wetlands. The primary concern of farmers and ranchers today is preserving the productivity of their agricultural and ranch lands so that they can earn a livelihood and survive financially in a competitive global market.

American farmers and ranchers currently have over 300 million acres in active production.[4] Economic Research Serv., U.S. Dep't of Agric., *Land Use, Value, and Management Q&A's*, (visited July 24, 2000), <http://www.ers.usda.gov/briefing/landuse/ruseqa6.htm>. Jurisdictional wetlands exist on approximately 99 million acres of those in active production. AFBF Mot. For Leave to File Br. Amicus Curiae and Br. Amicus Curiae in Supp. of the Pet. at 7. Approximately nine million isolated, intrastate waters are located in the United States, a significant number of which are located on farm and ranch lands in active production.[5] Jonathan B. Adler,

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[4] This does not include millions of acres of federal land under permit or lease to ranchers, upon which they have developed innumerable stock ponds and watering sites.

[5] Due to abnormally heavy rains during the past decade in the upper midwest region of the United States, numerous additional temporary isolated, intrastate waters have been created, and existing isolated, intrastate pools of water have

Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, 29 Northwestern Sch. L. Lewis & Clark Coll. Envtl. L. 1, 40 (1999). The isolated, intrastate waters located on agricultural lands may be created artificially or naturally, vary in size and depth and exist on a short-term or long-term basis. Some of them serve or could serve as resting, mating and living areas for migratory birds. However, like the water-filled trenches and depressions at the SWANCC site, they have absolutely no connection with navigable, interstate waters.

Section 404(f) of the CWA provides farmers and ranchers an exemption from the Section 404 permit requirements relating to the following discharges of dredged or fill material into those areas associated with navigable waters:

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable

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(cont'd.)..
expanded beyond their normal boundaries, reducing the number of acres in production.

structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; . . .

(E) for the purpose of construction or maintenance of farm roads or forest roads, . . . to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized . . . .

33 U.S.C. § 1344(f); 33 C.F.R. § 323.4 (1999).[6]

If the Corps' assertion of jurisdiction under the migratory bird rule is accepted by this Court, this exemption is illusory for farmers and ranchers. Even though the Section 404(f) statutory exemption existed in 1986, as did the related regulations,[7] the

[6] The application of this exemption is limited to on-going, established farming, silviculture and ranching activities. 33 C.F.R. § 323.4(a)(1)(ii) (1999).

[7] 51 Fed. Reg. 41,206, 41,233 (1986).

Corps, in the same preamble setting forth the migratory bird rule, reserved its right "on a case-by-case basis" to include in the definition of "waters of the United States":

> (a) Non-tidal drainage and irrigation ditches excavated on dry land.
>
> (b) Artificially irrigated areas which would revert to upland if the irrigation ceases.
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

51 Fed. Reg. 41,206, 41,217 (1986).

If the Corps' assertion of jurisdiction over the isolated, intrastate waters on the SWANCC site is upheld, then the Corps' reservation of rights over such waters located on agricultural lands may be exercised under the migratory bird rule.

The Corps' self-delegation of authority to apply the migratory bird rule to drainage and irrigation ditches, artificially irrigated areas and stock ponds is an outright violation of the 1977 amendments to the CWA. Congress expressed itself plainly in Section 404(f) when it exempted normal farming and ranching activities, as well as construction or maintenance of farm or stock ponds

or irrigation ditches or the maintenance of drainage ditches, from the permitting requirements of Section 404. The legislative history behind Section 404(f) is replete with support for Congress's plainly expressed intent.

Section 404(f) was added to the CWA by Public Law 95-217. The House of Representatives' debate on the conference report accompanying the House bill, H.R. 3199, pointed out that "[n]ew subsection (f) of section 404 provides that Federal permits will not be required for narrowly defined activities specifically identified in paragraphs A-F that cause little or no adverse effects either individually or cumulatively." 123 Cong. Rec. 38,997 (1977)(statement of Rep. Harsha).

The Corps decided to undertake a "case-by-case" determination as to whether farm and ranch waters are waters of the United States. The legislative history refutes the Corps' interpretation: "A case-by-case permit review would not be required for narrowly defined activities that cause little or no adverse effects either individually or cumulatively, *including those activities narrowly defined in 404(f)(1)(A-F).*" *Id.* (emphasis added).

Similarly, the Senate debate on the conference report states that:

> The conferees agreed to adopt the Senate amendment on particular exclusions from permit requirements. This legislatively clarifies the exclusion of certain activities that do not involve point source discharge and that will be adequately controlled by management practices. The amendment clarifies that normal farming, ranching, and silvicultural activities such as plowing, seeding, cultivating, and harvesting as well as minor drainage and soil and water conservation practices performed on uplands, were not intended to require 404 permits. The amendment also excludes from permit requirements, discharges of dredged or fill material in conjunction with the [construction or maintenance of farm and stock ponds or irrigation ditches].

Id. at 39,210-39,211 (statement of Sen. Wallop).

The Senate amendment was adopted prior to Senate passage of the underlying legislation, S. 1952. The report of the Senate Committee on Environment and Public Works discussed the rationale for the amendment. The Committee was persuaded by testimony that no Section 404 permit should be required for "gray area" practices involving agriculture, mining and construction activities. The Committee specifically exempted construction or maintenance of farm or stock ponds, as well as the construction and maintenance of agricultural irrigation ditches and the maintenance of drainage ditches, from the permit requirements. S. Rep. No. 95-370, 95th Cong., 1st Sess. 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4401. This was the source of the amendment which was eventually adopted by the conferees,

passed by the House and Senate, and enacted into law as Section 404(f) of the CWA.

In defending the amendment, Senator Muskie (floor manager for the bill) responded to a substitute amendment offered by Senator Bentsen by noting that "these normal activities which have aroused normal Americans against the threat of over-regulation by the Corps of Engineers have been exempted from that threat . . . ." 123 Cong. Rec. at 26,721. Senator Tower of Texas expressed similar concerns:

> If we do not act affirmatively and clean up the language in [the Clean Water Act], it will result in unwarranted and despotic intrusion by the Federal Government over every brook, creek, cattle tank, mud puddle, slough or damp spot in every landowner's backyard across this Nation.

Id. at 26,722.

The Corps' interpretation of its authority under the CWA, as stated in its preamble to its 1986 regulations, raises the very real specter of Senator Tower's prediction coming true, even after Congress took his advice and amended the CWA so as to prohibit expressly such an interpretation.

While the legislative history, statute and regulations evidence an intent to exempt certain farming and ranching activities from the Section 404 program, the application of such an exemption to current farming and ranching activities has become more challenging. Farmers and ranchers

today use advanced technologies and heavier and more cumbersome equipment in order to maintain a high level of productivity for their agricultural lands. Such technologies and equipment change rapidly. Farmers' and ranchers' use of new technologies and equipment threatens to increase conflicts with the Corps' interpretation of what constitutes "normal" farming and ranching activities under Section 404(f), thus increasing the potential for the Corps' assertion of jurisdiction over isolated, intrastate waters located on agricultural and ranch lands. In addition, the Corps' assertion of jurisdiction under the migratory bird rule threatens to overpower any rational analysis of whether certain activities constitute "normal" farming and ranching activities.

For example, in certain parts of California, deep plowing (five feet deep) is normal plowing practice, while such a practice is not necessary in the fertile midwest. Nevertheless, the Corps' assertion of jurisdiction under the migratory bird rule threatens to regulate isolated, intrastate waters, namely cropland depressions filled with water intermittently and temporarily, affected by such deep plowing practices. Similarly, current methods used for the manipulation of water levels for the production of rice have come under increasing scrutiny by the Corps, as rice fields make select habitat for migratory birds.

Farmers and ranchers will not be able to maintain current levels of productivity if their activities are deemed outside the scope of the Section 404(f) exemption and if the Corps is authorized to exercise jurisdiction over isolated, intrastate waters based solely on the catch-all

migratory bird rule. The Corps' expansive interpretation of its jurisdiction, if upheld, would adversely affect farmers and ranchers by decreasing their productive acreage, which would grossly increase the costs of producing food, fiber and livestock. And if the Corps' interpretation is upheld, farmers and ranchers would be forced to divert their energies to negotiating a regulatory morass which is time-consuming, expensive and often futile, hampering them from using their land in the most productive manner possible.

The Corps' interpretation of its jurisdiction at the SWANCC site far exceeds the authority Congress granted to the Corps under the CWA. Farmers and ranchers in the United States need a functional definition of "waters of the United States," not one which prevents the productive use of their farms and ranches by virtue of the presence or potential presence of migratory birds on isolated, intrastate waters within farm and ranch boundaries.

II. THE COMMERCE CLAUSE DOES NOT AUTHORIZE THE CORPS' JURISDICTION OVER ISOLATED, INTRASTATE WATERS WHICH MIGRATORY BIRDS MAY OR DO SELECT AS HABITAT.

There is no constitutional basis for the Corps' assertion of jurisdiction over isolated, intrastate waters under the Commerce Clause. Congress's Commerce Clause power is limited. Under the Commerce Clause, Congress may exert power to regulate activities that substantially affect commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

The dredging and filling of isolated, intrastate waters, particularly those located on remote agricultural lands, does not fall within the definition of activities affecting commerce. The addition of flocks of migratory birds to the remote landscape does not change this conclusion. As Justice Thomas stated, "The basis asserted to create federal jurisdiction over petitioner's land" is "even more farfetched than that offered, and rejected, in *Lopez*." *Cargill, Inc. v. United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting from denial of certiorari). Here, the Seventh Circuit relied on statistics relating to monetary earnings generated as a result of hunting, trapping and other commercial exploitation of migratory birds to connect migratory birds' selection of habitat with interstate commerce. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). By citing human exploitation of migratory birds as support for the Corps' assertion of jurisdiction over isolated, intrastate waters for wildlife "protection," the court not only contradicted itself, but showed just how farfetched the migratory bird rule is.

If this tenuous connection to interstate commerce is found to be sufficient under the Commerce Clause, there is no doubt that farmers and ranchers will be affected detrimentally, as they are forced to proceed through the Section 404 permit process or ultimately are denied dredge and fill permits at the end of the process. Migratory birds inhabit millions of acres of agricultural lands annually, resting on or making habitat in temporary, isolated water pockets in agricultural fields. The Seventh Circuit's conclusion that a habitat suitability criterion would limit the number of

isolated, intrastate waters affected by the Corps' assertion of jurisdiction is misguided. As any farmer, rancher or layperson knows, migratory birds are not discerning shoppers for habitat and will make homes of even the most shallow field puddle, stock pond or water-filled cattle track. The unpredictable behavior of migratory birds with respect to waters with no connection to navigable waters or commerce cannot withstand constitutional scrutiny as a legitimate basis on which to extend the Corps' jurisdiction over millions of acres of waters located on farms and ranches. Such an extension would amount to unauthorized federal regulation of land use, an area traditionally regulated by state and local governments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF THE SERRANO WATER DISTRICT; THE IMPERIAL IRRIGATION DISTRICT; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT; THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT; THE WESTERN COALITION OF ARID STATES; THE WESTERN GROWERS ASSOCIATION; TEJON RANCH CO.; AND THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over wholly intrastate waters, including ephemeral drainages in the West, solely because such waters are used, or could be used, as habitat by birds that cross State lines.

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Gregory v. Ashcroft, 501 U.S. 452 (1991) 15

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National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 22

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FEDERAL REGISTER

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LEGISLATIVE HISTORY

Oversight Hearings on Section 404 of the Clean Water Act, July 15, 1985, *reprinted in* Environmental Policy Division, Library of Congress, *A Continuation of the Legislative History of the Fed. Water Pollution Control Act* 170 (1985) 26
S. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776 12

Senate Debate on S. 1952, Aug. 4, 1977, *reprinted in* Environmental Policy Division, Library of Congress, *A Legislative History of the Clean Water Act of 1977* (Oct. 1978).....13

ADMINISTRATIVE MATERIALS

Environmental Lab., Dep't of the Army, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987).....7

EPA, *Decision of the Gen. Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m)* (Sept. 18, 1975).....20

EPA/Dep't of Army, *Guidance for Clean Water Act Juris. Over Isolated Waters in Light of* Tabb Lakes v. United States (Jan. 24, 1990).....17

EPA, Gen. Counsel Opin. 77-5, *Cooling Ponds as Navigable Waters* (Apr. 21, 1977).....20

EPA/U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Juris. Over Isolated Waters in Light of* United States v. James J. Wilson (May 29, 1998).....17

Letter from R. O. Buck, Asst. Dir. of Civ. Works, Dep't of the Army, to Hon. Owen Pickett, U.S. House of Rep. (Feb. 2, 1994).....7

Letter from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Hon. George J. Mitchell, U.S. Sen. (Oct. 11, 1985).....27

Letter from Lynn A. Greenwalt, V.P, Resources Conservation Dep't, Nat'l Wildlife Fed'n, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Oct. 25, 1985).....27

Letter from William M. Riley, Chief, Water Resources Assessment Section, EPA, to Burt Paynter, Chief, Reg. Branch, Portland Dist., U.S. Army Corps of Engineers, (Sept. 8, 1989).....29

Letter from Richard E. Sanderson, Acting Asst. Admin., External Affairs, EPA, to Hon. George J. Mitchell, U.S. Sen. (Sept. 17, 1985).....27

Letter from Richard E. Sanderson, Dep. Asst. Admin. for External Affairs, EPA, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Nov. 1985).....27

Memorandum from A. James Barnes, Acting Gen. Counsel, EPA, to Frank Covington, Dir. Water Mgmt. Div., Reg. 9, EPA (July 5, 1983).....21, 27

Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Asst. Admin., Office of External Affairs, EPA (Sept. 12, 1985).....20, 28

Memorandum from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Dir. of Civ. Works, Dep't of the Army (Sept. 20, 1985).....27

Memorandum from Patrick J. Kelly, Dep. Dir. of Civ. Works, U.S. Army Corps of Engineers, to Subcomm. on Envtl. Pollution, Comm. on Env't and Pub. Works, U.S. Sen. (Nov. 8, 1985).....27, 28

North Carolina Dep't of Env't and Natural Resources, *Wetlands Draining Policy* (1999) 17

Public Not. from John F. Adams, Chief, Reg. Div., Jacksonville Dist., U.S. Army Corps of Engineers (Mar. 12, 1986) 28

John F. Studt, Chief, Reg. Branch, U.S. Army Corps of Engineers, *Questions and Answers on 1987 Corps of Engineers Manual* (Oct. 7, 1991) 7

Summary of U.S. Army Corps of Engineers Delineation of Ephemeral Drainages in Ariz. (1998) 4, 13

U.S. Army Corps of Engineers Delineation of Site in Orange County, Calif. 4, 8, 12, 13

U.S. Army Corps of Engineers, *Determination of Juris. Under Clean Water Act (33 U.S.C. 1344) Madrona Marsh, Torrance, Calif.* (June 14, 1982) 20

U.S. Army Corps of Engineers/EPA, Correspondence Related to *Draft Guidance for Clean Water Act Juris. Over Isolated Waters* (Oct. 30, 1987) 19

U.S. Army Corps of Engineers, Los Angeles Dist., Delineation Letter (1998) 9

U.S. Army Corps of Engineers, Wetlands Delineation Field Testing Data (July 18, 1995) 8

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Calif. Resources Agency, Calif. Wetlands Info. Sys., <http://ceres.ca.gov/wetlands/tracking/table_tracking_three.html> (last modified Nov. 5, 1998) 25

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Memorandum in Supp. of Fed. Defendants' Mot. to Dismiss or in the Alt. for Summ. Judgment and in Opp. to Plaintiffs' Mot. for Partial Summ. Judgment, *Nat'l Wildlife Fed'n v. Laubscher*, Civ. Action No. G-86-37 (S.D. Tex. Aug. 6, 1986) 21

Jack K. Moody, Wash Flow and Rainfall Data for Maricopa County, Ariz. (July 2000) 4, 10

David Sunding & David Zilberman, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal* (Jan. 2000) 11

USDA, Wetlands Reserve Program, *Data and Statistics*, <www.wl.fb-net.org/ca.htm> (last modified Jan. 1, 2000) 25

INTEREST OF *AMICI CURIAE*[1]

The Serrano Water District, a California public agency, manages the 30,000 acre-foot Santiago Reservoir and a water distribution system for the City of Villa Park. The district is often required to obtain Section 404 permits for maintenance work on its distribution system.

The Imperial Irrigation District was formed under State law to provide irrigation water and electric power to nine cities and nearly 500,000 acres of agricultural land in the Imperial Valley, California. It operates an extensive gravity flow system comprising 1457 miles of canals and other means of water delivery, hundreds of miles of surface drains, 10 reservoirs and approximately 430 control structures. Although the area averages less than three inches of rain a year, the Corps requires the district to get Section 404 permits for work on its water and power distribution systems if they impact ephemeral drainages.

The Metropolitan Water District of Southern California, created by the California legislature in 1928, provides water to nearly 17,000,000 people in southern California through its twenty-seven public agency members. The district manages the Colorado River Aqueduct, which includes 5 pumping plants, 92 miles of tunnels, 63 miles of concrete-lined canals, 55 miles of concrete conduits, 29 miles of inverted siphons, 3 reservoirs and 306 miles of high-voltage power lines. Much of the area around these facilities contains ephemeral

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[1] No counsel for any party authored this brief in whole or in part. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

drainages over which the Corps asserts jurisdiction through the migratory bird rule.

The Central Arizona Water Conservation District is a water district comprising Maricopa, Pima and Pinal Counties. The district operates and maintains the Central Arizona Project, a $3.4 billion water conveyance system comprising 336 miles of canals, tunnels, siphons and pipelines, 14 pumping plants and 2 dams.

The Riverside County Flood Control and Water Conservation District was created by the California legislature in 1945 to plan, design, construct and maintain flood control and drainage facilities over 2700 square miles of Riverside County. The district manages 400 miles of open channels and underground storm drains, 16 dams and 24 major detention basins serving 1,000,000 people. The county is riddled with ephemeral drainages that the Corps claims are jurisdictional under the migratory bird rule.

The Western Coalition of Arid States is a group of local governmental water and wastewater agencies in Arizona, California, Nevada, New Mexico, Texas, Oregon, Colorado and Idaho dedicated to developing water quality regulations, policies and laws responsive to the unique ecosystems of the arid and semiarid regions of the Western States.

The Western Growers Association (WGA) is an agricultural trade association established in 1926 whose 3000 members grow, pack and ship most of the fresh vegetables, fruits and nuts grown in California and Arizona. WGA members are often required to get Section 404 permits for routine land management, flood control and maintenance activities.

Tejon Ranch Co. is a diversified real estate development and agribusiness company, the principal asset of which is 270,000 acres of land in the southern San Joaquin Valley in

Kern County. The ranch has numerous ephemeral streams that disappear into the sandy soil before they can connect with any other waters.

The Foundation for Environmental and Economic Progress, Inc. is an association of large landowners and developers who work together to address federal environmental and economic policies affecting the use of land. Foundation members own land in forty-four States and are actively pursuing projects in the West and Southwest that are affected by the migratory bird rule.

Amici are filing this brief because the Corps' assertion of jurisdiction using the migratory bird test has consequences well beyond those in the primary case, affecting a wide range of activities undertaken by individuals, businesses and agencies of State and local government. The application of this rule in the West and Southwest has led to jurisdictional claims over intrastate dry gulches whose connection to interstate commerce is as tenuous as the water that flows down the washes is rare. *Amici* have experienced, and are aware of, numerous situations in which the activities of nonfederal parties have been prejudiced by the Corps' claim of jurisdiction based on the ambiguous migratory bird rule.

SUMMARY OF ARGUMENT

Under the migratory bird policy at issue in this case, the Corps of Engineers claims jurisdiction over any "water," no matter how small or how far removed from interstate or navigable waters, if the water is used or could be used by birds that cross State lines. Since the Corps' definition of "waters" includes intrastate ephemeral waters that are commonplace across the Western landscape, and since few places on earth are not susceptible to use by birds that cross

State lines, the effect of the bird policy is to federalize land use regulation across the United States.

The impact of these policies in the West is far from trivial. In Orange County, California, the Corps now claims regulatory authority over hillside gullies that are one foot across and forty feet long.[2] At one 1800-acre site in Arizona, the Corps claimed jurisdiction over 43 discrete drainageways, including one that is one-half inch deep, 10 feet wide, and 100 feet long.[3] Total jurisdiction was only fifteen acres, but the drainages were interspersed throughout the site, so that none of the surrounding uplands could be developed without a Corps permit. Measurements taken by Maricopa County Flood Control District show that one jurisdictional wash at South Mountain carried water for only 7.5 hours (in total) from June 1993 to July 2000, although during that same period there were 182 measurable rainfall events.[4]

Although Congress intended to expand federal authority when it passed the Clean Water Act, it was also careful to preserve the traditional authorities of State and local governments over land use decisionmaking. There is no evidence that Congress intended to regulate the isolated ponds, ephemeral drainages and erosion ruts that are now

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[2] Exh. 4, U.S. Army Corps of Engineers Delineation of Site in Orange County, Calif. [hereinafter Orange County Delineation]; Exh. 5, Ground-Level Photo. of Juris. Ephemeral Drainages in Exh. 4 [hereinafter Orange County Photographs]. (Documents designated as Exhibits herein are contained in the Appendix to this Brief.)

[3] Exh. 10, Summary of U.S. Army Corps of Engineers Delineation of Ephemeral Drainages in Ariz. [hereinafter Ariz. Delineation].

[4] Exh. 8, Jack K. Moody, Wash Flow and Rainfall Data for Maricopa County, Ariz. (July 2000) [hereinafter Maricopa Data].

jurisdictional under the migratory bird test, and absent a clear statement that Congress intended to override traditional State functions, the Court should not construe the statute to do so.

Moreover, even if Congress had intended such an invasion of traditional State functions, the Commerce Clause would not empower it to do so, as the link between the filling of a remote drainageway and interstate commerce is too attenuated. Accordingly, the migratory bird rule is invalid on its face and should be struck down.

ARGUMENT

This case tests the limits of federal authority under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, an issue that was left open after the Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985) (decision does not address Corps' authority over waters "that are not adjacent to bodies of open water").

The Clean Water Act (CWA or the Act) regulates "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. § 1362(7). The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), in their regulations, define their jurisdiction to include (in addition to navigable and tidal waters, their tributaries and adjacent waters) all other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." *See* 33 C.F.R. § 328.3(a)(3) (Corps); 40 C.F.R. § 230.3(s)(3) (EPA).[5] In a preamble to its 1986 regulations, the Corps observed that EPA had "clarified" that Section 404 also reaches waters which "are or would be used

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[5] The Corps and EPA administer Section 404 jointly. 33 U.S.C. § 1344(a)-(c).

as habitat" by "(i) birds protected by Migratory Bird Treaties, or . . . (ii) other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This so-called "migratory bird rule"[6] injects the federal government into countless land use decisions that would otherwise be made by local government and displaces or duplicates environmental regulatory schemes enacted by State legislatures. The result is protracted delay and substantial additional costs for important public and private projects, but, at least in many parts of the West, with little or no environmental benefit. This pervasive federal presence smothers the States and local governments, transforming these governments into agents of federal power rather than independent engines of government policymaking. State programs are made surplusage, legislative choices are foreclosed and decisions of enormous local consequence are made through a one-size-fits-all federal regulatory scheme adopted by people in Washington who have little understanding of local conditions.

Amici believe that the migratory bird rule, relying as it does on *potential* effects on commerce, is invalid on its face, and should be struck down in its entirety. Moreover, because the agencies' jurisdictional claims under Section 404 have moved up the hill and out the Commerce Clause limb since the Court's decision in *Riverside Bayview*, it is important that the Court clarify the principles that define the scope of federal authority under Section 404.

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[6] As the "rule" only appears in a regulatory preamble and was not promulgated in accordance with Administrative Procedure Act (APA) requirements, it is not a rule at all. Nonetheless, this policy has been called a "rule" throughout this litigation.

I. THE MIGRATORY BIRD TEST TRANSFORMS EPHEMERAL DRAINAGES INTO WATERS OF THE UNITED STATES AND THEREBY FEDERALIZES LOCAL LAND USE DECISIONMAKING IN THE WEST.

Federal jurisdiction under Section 404 of the Clean Water Act is premised on two findings: (1) that a particular area qualifies technically as a wetland or an "other water," and (2) that the alteration of the water will affect interstate commerce. The migratory bird test challenged in this case – which asserts federal authority over waters that "would be used" or "could be used" by birds that cross State lines – is the vehicle used by the Corps and EPA to establish a Commerce Clause nexus for areas that would otherwise not be deemed to affect commerce – *e.g.*, tiny isolated wetlands and ponds throughout the Nation, ephemeral waters in the arid West, drainage ditches and irrigation ditches constructed to manage water flow, and ridgetop gullies carved into hillsides by intense but infrequent rain events.

Although Section 404 is generally regarded as a "wetlands"[7] statute, *amici's* operations are affected primarily

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[7] Under some interpretations, an area that is never wet at the surface can nonetheless be a wetland. Environmental Lab., Dep't of the Army, *Corps of Engineers Wetlands Delineation Manual* 36, 38 (Jan. 1987) (lodged) (hydrology criterion satisfied if groundwater rises to within 12 inches of the surface for five percent of the growing season every other year); John F. Studt, Chief, Reg. Branch, U.S. Army Corps of Engineers, *Questions and Answers on 1987 Corps of Engineers Manual* 3-4 (Oct. 7, 1991) (lodged); Exh. 27, Letter from R. O. Buck, Asst. Dir. of Civ. Works, Dep't of the Army, to Hon. Owen Pickett, U.S. House of Rep. (Feb. 2, 1994) ("an area may be considered 'saturated to the surface' even though the top plane of the soil is dry."). A 1995 Corps study found that the (continued)

by "other waters" that are not wetlands, *e.g.*, the non-wetland ponds at issue in the case at bar and linear drainages that are common to the West. The Corps regulates three kinds of linear waterbodies: perennial streams, intermittent streams and ephemeral streams. Under the Corps' definitions, perennial streams carry water year-round, and groundwater is their primary water source. 65 Fed. Reg. 12,818, 12,898 (Mar. 9, 2000). "Intermittent streams" carry water during certain times of the year when groundwater rises to the surface, but do not have flowing water during dry periods. *Id.* "Ephemeral streams," the driest and most remote of the three, have "flowing water only during, and for a short duration after, precipitation events . . . [and] are located above the water table year-round." *Id.* at 12,897.

These "waters" concern *amici* because they are commonplace throughout the Western landscape – *i.e.*, even the most skillful land planner cannot design a project to avoid all the drainages that inevitably criss-cross undeveloped land – and because the Corps uses the migratory bird rule to claim jurisdiction over drainages as narrow as one foot across. *See, e.g.*, Exh. 4, Orange County Delineation; Exh. 5, Orange County Photographs.

The Corps uses the "ordinary high water mark" (OHWM), to determine both the existence and the boundaries of Western "waters." 51 Fed. Reg. at 41,217 (lateral and upstream limits of Corps jurisdiction in nontidal waters defined by

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Corps regulates over 8.3 million isolated wetlands, each smaller than half an acre, in forty-one States within the continental United States. U.S. Army Corps of Engineers, Wetlands Delineation Field Testing Data (July 18, 1995) (lodged). These areas are jurisdictional only by virtue of the migratory bird policy.

OHWM). The Corps identifies an OHWM by "physical characteristics such as . . . shelving, . . . destruction of terrestrial vegetation, [or] the presence of litter and debris." 33 C.F.R. § 328.3(e). In the arid West, with its long dry spells punctuated by monumental downpours, just one rainfall can carve a new channel in the sandy desert floor and establish "shelving" or "debris" to create an apparent OHWM.[8] These physical characteristics may persist for decades after a channel last carried water.

Not only are these waterbodies pervasive and generally small, they rarely carry water. Even when it rains. In Phoenix, for example, where average annual rainfall is 7.65 inches (compared to 40 inches per year in Washington, D.C.), records kept by the Flood Control District of Maricopa County (FCDMC) from 1993 to 2000 show that one forty-foot-wide wash at South Mountain, Maricopa County, Arizona, carried measurable water flow only five times out of 182 rainfall events in seven years. Total elapsed time of flow for the entire seven-year period was only 7.5 hours, and, despite the theoretical possibility of a surface connection,

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[8] Indeed, the Corps' boilerplate jurisdictional determination letter "reserves the authority . . . to establish new jurisdictional limits if an unusual flood event alters stream conditions." Exh. 9, U.S. Army Corps of Engineers, Los Angeles Dist., Delineation Letter (1998). The very concept of an *ordinary* mark in a region that is characterized by extraordinary events is nonsensical. But the situation goes unchallenged because Corps jurisdictional determinations have not been directly appealable to the courts, *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996), or administratively. A new administrative appeals process, adopted in March 2000, may provide a limited forum to test questionable jurisdictional determinations. 65 Fed. Reg. 16,486 (Mar. 28, 2000).

FCDMC observations show that the water in the wash never reached the Gila River. Moreover, on those rare occasions when these washes actually experienced flowing water, the flow lasted, on average, only ninety minutes.[9]

Significantly, the channels monitored by FCDMC are larger, with a larger contributing drainage area, than most of the ephemeral waters over which the Corps claims jurisdiction. The South Mountain channel drains a two-square-mile watershed, but, more typically, the Corps takes jurisdiction over drainages with "watersheds" of one-quarter to one-tenth square mile. *See, e.g.*, Exh. 6, Aerial Photo. of Ephemeral Drainages at South Mountain, Maricopa County, Ariz. Such washes are narrow, carry water only rarely and generally lack a surface connection to true waters of the United States. Moreover, the channels themselves do not provide nesting or breeding habitat for birds (much less for waterfowl sought after by bird-watchers or hunters). Indeed, in many cases, the plant species that occur in the claimed jurisdictional areas are also found in the surrounding uplands. *See, e.g.*, Exh. 2; Exh. 3.

Nevertheless, these ephemeral waters exhibit debris lines or shelving that the Corps uses, incorrectly in *amici*'s view, to establish an OHWM. Of course, *amici* are not before this Court to challenge the Corps' erroneous use of OHWM. Our point is that with the Corps using such criteria, the drainages that are potentially waters of the United States are ubiquitous in the Western landscape. The migratory bird policy then provides the Commerce Clause nexus to transform these common drainages into waters of the United States,

[9] Exh. 8, Maricopa Data. Flow becomes "measurable" if it is at least 1.2 inches deep at the lowest point of the wash.

simultaneously transforming Section 404 into a federal land use regulation.

On one 1800-acre site in northern Arizona, the Corps claimed jurisdiction over forty-three discrete drainages, ranging in depth from one-half inch to 45.8 inches, in width from 3 feet to 50 feet, and in length from 100 feet to 9160 feet. Sixteen of these drainages were less than five inches deep, and seventeen were less than five feet wide. *See* Exh. 10, Ariz. Delineation. Total claimed jurisdiction was fifteen acres, most of which carried water only twice a year and terminated on, or shortly downstream of, the property, with stormwater runoff simply pooling up and then evaporating or percolating into the sandy soil. The applicant managed to design the project to avoid all but four acres of drainages, but they were so interspersed throughout the property that none of the surrounding uplands could be developed without first obtaining a Section 404 permit. Thus, the presence of four acres of jurisdiction "federalized" an 1800-acre project.[10] *See id.*

Similar results obtain in Orange County, California, where the Corps has exerted control over hillside gullies that are

[10] And with federalization comes delay. In one extreme case, it took the Corps almost eight years to award the Riverside County Flood Control and Water Conservation District (Riverside) a permit for its San Jacinto River Project, and, in San Diego, the Corps still has not issued a public notice 15 months after a developer submitted an application to fill 2.89 acres on a 1665-acre site. A January 2000 study by economists from the University of California, Berkeley, confirms that this experience is not unusual. David Sunding & David Zilberman, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal*, 23 n.2, 24 (Jan. 2000) (lodged); *see also*, Virginia S. Albrecht & Bernard N. Goode, *Wetland Reg. in the Real World* 21 (Feb. 1994) (lodged).

one foot wide and only forty feet long. Exh. 4, Orange County Delineation; Exh. 5, Orange County Photographs. In the Sonoran Desert in Arizona and in the Mojave Desert in rural California (where the average rainfall is 5.89 inches), the ephemeral waters run in roughly parallel lines as little as ten to twenty-five feet apart, like pinstripes across the desert. *See* Exh. 1, Aerial Photo. of Ephemeral Drainages in Mojave Desert, Calif [hereinafter Mojave Photograph]. An average ten acre site has dozens of these drainages.

II. CONGRESS DID NOT INTEND TO CLAIM JURISDICTION OVER EPHEMERAL DRAINAGES REACHED BY THE MIGRATORY BIRD POLICY.

A. Congress Intended To Expand Federal Authority But Not To Ephemeral Drainages And Other Remote "Waters."

There is no question that Congress intended the Act to reach further than had earlier federal water pollution control statutes. As the Corps is fond of noting, the Conference Report accompanying the 1972 legislation stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. However, while this Court has observed that Congress intended "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term," *Riverside Bayview*, 474 U.S. at 133 (emphasis added), neither this Court, the statutory language nor the legislative history suggested that Congress

wanted to regulate all, or even some, of the remote waters that are now included through the migratory bird rule.

While the 1972 debate was carried on in terms of lakes, rivers and oceans, and in 1977, concern was expressed about adjacent wetlands because they help filter adjacent waterways,[11] Congress never mentioned ephemeral waters such as those that cross the Western landscape. Indeed, in 1977, the Corps indicated that it believed ephemeral waters were not jurisdictional at all. When the Corps amended its regulatory definition of the statutory term "waters of the United States," a footnote to the rule explained that the new definition "incorporates *all* other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce . . . ." 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977) (emphasis added). That all-encompassing definition included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. § 323(a)(5) (1978). Significantly, this definition did not include ephemeral waters. Today, the Corps is regulating ephemeral drainages in the West that are as narrow as one foot, as shallow as one-half inch, and as short as forty feet. *See* Exh. 4, Orange Delineation; Exh. 10, Arizona Delineation.

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[11] *See, e.g.*, Senate Debate on S. 1952, Aug. 4, 1977 (statement of Sen. Chafee), *reprinted in* Environmental Policy Division, Library of Congress, *A Legislative History of the Clean Water Act of 1977*, at 919 (Oct. 1978) (lodged).

To interpret the statute as conferring such broad authority raises serious constitutional questions, discussed below, and reads the statutory term "navigable waters" out of the Act, contrary to well-established principles of statutory construction. *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) ("Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense" (internal quotation omitted)).

Yet the bird test does just that, because it claims jurisdiction in areas that are not remotely navigable or otherwise connected to an interstate network of waters.

B. Absent A Clear Statement From Congress, The Court Should Not Construe The Statute To Alter The Federal-State Balance In Land Use Regulation.

The migratory bird test effects a massive intrusion of federal power into land use decisions that by tradition are the province of the States.[12] Of course, if Congress, acting pursuant to one of its enumerated powers, wants to enact a program to override State law, the Supremacy Clause gives it the power to do so. U.S. Const., art. VI. To preserve the integrity of our federal system, however, the Court will not construe a statute to effect such an intrusion into historic police powers (*e.g.*, zoning and planning) unless it is absolutely clear that this is what Congress intended. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985). In this case, it is not.

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[12] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

During the same period that Congress was considering and enacting the bills that ultimately became the Clean Water Act, the Endangered Species Act and other important federal environmental programs, Congress considered and rejected some forty national land use bills. *See* Linda A. Malone, *Envtl. Reg. of Land Use* § 1.01 at 1-2 (1990). The CWA specifically recognized that States have primary responsibility over land and water resources within their borders, 33 U.S.C. § 1251(b), and declined to regulate nonpoint source pollution such as runoff associated with agricultural, silvicultural, construction and mining operations. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 304(e)(A)-(C), 502(14), 86 Stat. 816, 852, 887 (1972). Congress's respect for traditional State authorities was particularly fitting in the West, where the allocation, use and quality of scarce water supplies are crucial factors influencing development patterns.[13]

The migratory bird test destroys Congress's careful balance, extending federal authority to ephemeral and isolated waters that fan out across the Western landscape. Although the acreage of these drainages is relatively small, they run in roughly parallel lines through otherwise upland areas, making it impossible to use the uplands without obtaining a Section 404 permit. Exh. 1, Mojave Photograph.

Under our federal system, the Court will not allow this result unless it is clear that Congress considered and intended, when it passed the Act, to alter the traditional balance between the federal and State governments. This

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[13] *See* 33 U.S.C. § 1251(g) (stating that CWA does not affect States' authority to allocate water within its borders).

"clear statement rule" applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States," *Lopez*, 514 U.S. at 611 (Souter, J., dissenting), and is particularly important in construing criminal statutes such as the Clean Water Act. *Jones*, 120 S. Ct. at 1912 (Stevens, J., concurring) (noting the "kinship between our well-established presumption against federal pre-emption of state law, . . . and our reluctance to believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." (Internal quotation omitted)).

The wisdom of federalism is that with two governments vying for authority, the risk of tyranny or abuse from either is reduced. But "[t]hese twin powers will act as mutual restraints only if both are credible," *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), and only if the citizen knows which government should be held accountable if a given function is not performed properly. *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). Thus, although some have argued in the past that State officials need the federal "gorilla in the closet" to give them political cover, such an approach would disserve fundamental federalism principles.

In the absence of federal regulation, myriad approaches could be taken to these ephemeral waters, and what works best in Orange County, California, may not work at all in Maricopa County, Arizona, or South Bend, Indiana. Acknowledging a more limited federal role allows the "states [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* at 581 (Kennedy, J., concurring).

Empirical evidence suggests that this federalism principle is not just an empty abstraction. When two court of appeals decisions in 1997 and 1998 effectively limited federal

authority under Section 404, uniquely affecting mid-Atlantic States with high water tables,[14] the States of Maryland, Virginia and North Carolina stepped into the breach. Maryland enforced its own pre-existing wetlands laws;[15] North Carolina adopted a new drainage policy to prevent large-scale drainage projects;[16] and Virginia passed a new law to protect its valuable wetlands.[17] So experience in the environmental arena confirms the founders' confidence in the States. Meanwhile, EPA and the Corps have yet to propose promised new rules to respond to the 1997 and 1998 cases, not to mention the 11-year-old decision in *Tabb Lakes, Ltd. v. United States*, No. 89-2905, 1989 WL 106990 (4th Cir. Sept. 19, 1989) (Exh. 11).[18] They have simply revised judicial history to avoid the implications of a decision they find unpalatable.[19]

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[14] *National Mining Ass'n v. Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); *United States v. Wilson*, 133 F.3d 215 (4th Cir. 1997).

[15] Md. Code Ann. Envir. §§ 5-901 to 5-911.

[16] North Carolina Dep't of Env't and Natural Resources, *Wetlands Draining Policy* (1999) (lodged).

[17] 2000 Va. Acts. ch. 1054 (lodged).

[18] Exh. 26, EPA/Dep't of the Army, *Guidance for Clean Water Act Section 404 Juris. Over Isolated Waters in Light of* Tabb Lakes v. United States (Jan. 24, 1990) ("EPA and the Corps intend to undertake as soon as possible an APA rulemaking process").

[19] *See*, EPA/U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Juris. Over Isolated Waters in Light of* United States v. James J. Wilson 4 n.3 (May 29, 1998) ("notwithstanding the Fourth Circuit's decision in *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated intrastate water bodies that serve as habitat for migratory birds").

III. THE MIGRATORY BIRD TEST EXCEEDS CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE.

With its migratory bird test the Corps has tried to do what even Congress lacks the power to do: It has invoked the federal Commerce Power to regulate purely local matters in an area of traditional State concern, using as its rationale a series of noncommercial links between the regulated activity and the commerce.

The Corps' problem is that the regulated activity is not interstate, and the bird nexus is not commerce.

A. Even If SWANCC's Project Were Considered "Economic," That Does Not Mean That Section 404 Is An Economic Regulation Under *Lopez* And *Morrison*, Nor That The Alteration Of Any Particular Waterbody Affects Commerce.

The "regulated activity" in this case is the "discharge of dredged or fill material into the navigable waters," 33 U.S.C. § 1344(a), which has come to mean most earth-disturbing activities.[20] When this activity involves only "isolated" waters, unconnected to interstate streams, it is purely local. The movement of dirt, like possession of guns or gender-based violence,[21] is not in itself "economic" activity.

The government appears to claim that the activity in this case is "economic" (and therefore the aggregate effects of all similar activities may be considered in determining whether

[20] *See, e.g., Avoyelles Sportsmen League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

[21] *Lopez*, 514 U.S. at 549 (possession of guns); *Morrison*, 120 S. Ct. at 1740 (gender-based violence).

there is a substantial effect on commerce) because the Solid Waste Agency of Northern Cook County intends to build a landfill on top of the site. The Corps itself has recognized that such an argument would be mere bootstrapping. In a 1987 guidance document that was signed by the Corps but apparently not by EPA, the Corps observed that

> [a]n interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. Neither the process of excavating material from dry land nor the placement of fill into the waterbody shall in and of itself be considered the requisite interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the source of fuel used during the operation or the business connections of the individual owning, managing, or conducting the operation. Where an isolated waterbody does not otherwise have an interstate commerce connection, the fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody. . . .[22]

This reasoning is consistent with *Lopez*, which struck down a federal statute purporting to prohibit the possession of firearms in a school zone, even though guns travel in

[22] Exh. 24, U.S. Army Corps of Engineers/EPA, Correspondence Related to *Draft Guidance for Clean Water Act Juris. Over Isolated Waters* (Oct. 30, 1987).

interstate commerce, and even though Lopez himself was paid $40 to deliver the gun. *See Lopez*, 514 U.S. at 602; *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). The fact that there is a whiff of commerce in the vicinity does not federalize all nearby activity.

Even if aggregation were appropriate for purposes of determining whether the CWA regulates an activity that has a substantial effect on commerce, that would not mean that the Corps could dispense with the requirement that an effect on commerce be found in each individual case in which the Corps claims jurisdiction. The memorandum by EPA's General Counsel that established the migratory bird test recognized that the Commerce Clause nexus must be established case-by-case[23] and to that extent is consistent with Corps and EPA practice throughout the history of the CWA.[24]

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[23] Exh. 16, Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Asst. Admin., Office of External Affairs, EPA (Sept. 12, 1985) [hereinafter Blake Memorandum].

[24] *See, e.g.*, Exh. 12, EPA, *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §125.36(m)* (Sept. 18, 1975) (creek in Ely, Nevada not jurisdictional; "cattle from Utah are [not] the sort of 'interstate travelers'" contemplated by the regulation); Exh. 13, EPA, Gen. Counsel Opin. 77-5, *Cooling Ponds as Navigable Waters* (Apr. 21, 1977) (cooling pond in Indiana not jurisdictional so long as it is used only by Indiana residents); Exh. 14, U.S. Army Corps of Engineers, *Determination of Juris. Under Clean Water Act (33 U.S.C. 1344), Madrona Marsh, Torrance, Calif.* (June 14, 1982) (declining jurisdiction over California marsh that provides resting and wintering habitat for migratory waterfowl where no hunting occurs at marsh and where there is no evidence that interstate visitors to marsh would modify their interstate travel plans if the marsh were altered); Exh. 15, Memorandum from A. James Barnes, Acting Gen. Counsel, EPA, to Frank Covington, Dir. (continued)

Even where Congress has elected to use its full Commerce Clause authority to regulate a class of activities, which it has not with the wetlands and ephemeral drainages reached by the bird rule, that only extends federal authority to activities and places that are documented members of the regulated class. *See, e.g., Perez v. United States*, 402 U.S. 146, 151-55 (1971) (noting the "[p]etitioner is clearly a member of the class" regulated). The bird test effectively excuses the government from the obligation to document a Commerce Clause effect for a "particular waterbody" because it is satisfied by any migrating bird and any kind of bird use.[25]

Water Mgmt. Div., Reg. 9, EPA (July 5, 1983) (asserting jurisdiction over Ash Meadows, Nevada, based on evidence that out-of-state scientists visit the site for research purposes); *see also* 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (acknowledgment by EPA that there are wet areas that are not jurisdictional because "their destruction or degradation would not have any effect on interstate commerce"); Memorandum in Supp. of Fed. Defendants' Mot. to Dismiss or in the Alt. for Summ. Judgment and in Opp. to Plaintiffs' Mot. for Partial Summ. Judgment, *Nat'l Wildlife Fed'n v. Laubscher*, Civ. Action No. G-86-37, 46-55, 58 (S.D. Tex. Aug. 6, 1986) (selected portion lodged) (arguing that Congress did not regulate wetlands "as a class," that therefore the government may not "assume a [Commerce Clause] connection" but must establish it "through the actual or potential use of [the] wetlands," and that a regulatory program that reached every tiny drainage would be "unreasonable over-regulation").

[25] *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) ("regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial"); *In re The Hoffman Group*, CWA Appeal No. 89-2, at 9 (EPA Nov. 19, 1990) (final decision) (lodged) (to "demonstrate that the destruction of that waterbody will have an effect on interstate commerce . . . EPA need only show some minimal, potential effect on interstate commerce").

B. The Idea That The Alteration Of Tiny Waterbodies Would Affect Interstate Commerce Is Pure Speculation.

With no Congressional or administrative record documenting the government's thinking on the migratory bird rule, it is hard to discern the legal theory behind the rule. The reliance on "birds which cross states lines" suggests that the government hopes that the birds will provide the interstate element. 51 Fed. Reg. at 41,217. But migratory birds are not themselves "commerce."[26] Nor does the recitation of a "national interest" in the protection of migratory birds excuse the government from finding an effect on commerce.[27]

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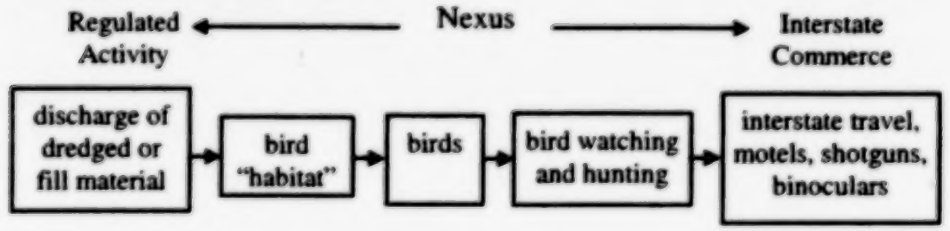
[26] The theory that birds themselves are "in" interstate commerce, like feathered Federal Express packages, is wrong for the reasons given for red wolves in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *see also National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving Fly not in interstate commerce). In *Geer v. Connecticut*, 161 U.S. 519, 538-39, 541, 543-44 (1896), two dissenting justices suggested that an animal that is personal property can be considered an "article of commerce." But this Court has never held that wild birds are "articles in commerce."

[27] The cases cited in the Blake Memorandum, by the court of appeals below, and in the Respondents' brief in opposition to petition for writ of certiorari say things like "the protection of migratory birds" is a "national interest," quoting *North Dakota v. United States*, 460 U.S. 300, 309 (1983). None of these cases, however, suggests that birds are themselves "commerce." *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979); *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Missouri v. Holland*, 252 U.S. 416 (1920). Indeed, most of them refer to the Treaty Power (U.S. Const. art. II, § 2, cl. 2). The Corps, however, may not invoke the Treaty Power to justify its jurisdictional claims where Congress was not exercising the Treaty Power when it passed the underlying statute. *See Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) ("treaty power can only be exercised in a manner which conforms to the Constitution").

The government appears to rely primarily on asserted effects on interstate travel, but the chain of causation is too long and slender to bear the weight the government would have it support. The government's reasoning goes something like this: Filling affects habitat; habitat affects birds; birds affect hunters and bird-watchers; and hunters and bird-watchers affect "commerce" by traveling across State lines and spending money on transportation, motel rooms, binoculars, shotguns, cartridges and equipment from L.L.Bean. This is the store that sold the khakis, that clothed the hunter, that shot the bird, that ate the seeds, that grew in the pond that Jack filled:



This piling of "inference upon inference" is what the Court disapproved of in *Lopez*, 514 U.S. at 567 – a "but-for causal chain" that would place any problem under federal jurisdiction if it affected many people, places or properties.[28]

Of the four considerations that made the gun possession law in *Lopez* unconstitutional, one was the attenuated link between the regulated activity and the effect on interstate commerce. *See Id.* at 561. The links here (between a landowner's grading an ephemeral water and hunters buying

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[28] *Morrison*, 120 S. Ct. at 1752-53. For observations on the misuse of causation, see *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 309-10 (1981) (Rehnquist, J., concurring); *Morrison*, 120 S. Ct. at 1753 n.6.

cartridges or driving to a duck blind) are more attenuated than in any case upholding Congress's exercise of the Commerce Power.[29]

Reasoning similar to the Corps' was rejected by this Court in *Morrison*. There, the government argued that violence against women deterred potential victims from traveling interstate, from finding jobs in interstate business, and from "transacting with business, and in places involved, in interstate commerce." *Morrison*, 120 S. Ct. at 1763 (Souter, J., dissenting) (quoting, H.R. Conf. Rep. No. 103-711, at 385 (1994)). This in turn allegedly diminished national productivity, increased medical and other costs and decreased both the supply of, and demand for, interstate products. *Id.* The chain in *Morrison* was shorter than here, but the reasoning was still too tenuous to support the exercise of Commerce Clause authority.[30]

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[29] The lower court cases cited frequently to support an expansive view of federal jurisdiction over ephemeral waters cannot stand after *Lopez* and *Morrison*. *See Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985) (normally dry arroyos that only flow for short distances and then soak into the ground can be jurisdictional waters of the United States if those waters then "become part of [an] underground aquifer[], and after a lengthy period, perhaps centuries," eventually discharge into a navigable water); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

[30] Moreover, there is no evidence that the absence of *federal* regulation over waters reached by the migratory bird rule will deplete the Nation's supply of waters. California, for example, has a wide range of laws protecting wetlands and other waters. *See, e.g.*, Cal. Fish & Game Code §§ 1601, 1603; Cal Pub. Res. Code § 30233. These laws require permittees to replace any waters they destroy, often at a ratios of 2:1 or 3:1. Since 1993, California's wetland laws have restored, enhanced and created 165,436 acres of wetlands. Calif. Resources Agency, Calif. (continued)

C. The Claimed Connection Between Bird Habitat And Interstate Commerce Is Not Supported By Either Congressional Or Administrative Findings.

The adoption and imposition of the migratory bird test has been a litany of irregularity, which is not entitled to any judicial respect. The issue posed by the rule is whether Congress's power under the Commerce Clause allows the Corps to claim jurisdiction over an intrastate waterbody based solely on its use (actual or potential) by birds that cross State lines. Within our Constitutional system of separation of powers and from the standpoint of institutional competence, the issue of Congressional power can only be resolved by this Court, assisted by relevant and authoritative findings of Congress. The determination of Congress's Constitutional powers is not a matter to be left to the Executive Branch or one in which the Executive Branch has institutional competence or is entitled to institutional respect.

Yet the migratory bird rule is exclusively a creature of Executive invention. In the voluminous legislative history of the Clean Water Act, there are no Congressional findings invoking the migration of birds as a source of Congress's Commerce Clause authority or explaining, as a factual

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Wetlands Info. Sys., <http://ceres.ca.gov/wetlands/tracking/table_tracking_three.html> (last modified Nov. 5, 1998). In addition, other federal programs add to the Nation's stock of wetlands – for example, the Department of Agriculture's Wetland Reserve Program has enrolled 785,024 acres in its preservation and restoration program. USDA, Wetlands Reserve Program, *Data and Statistics*, <www.wl.fb-net.org/ca.htm> (last modified Jan. 1, 2000).

matter, how the alighting of migratory birds in occasionally wet areas substantially affects interstate commerce.

Instead, the bird test was dropped into a preamble of a lengthy recodification of Corps regulations and is untethered to the regulation defining "waters of the United States." The Corps and EPA did not give the public any notice or opportunity to comment on this vast expansion of federal power. There is no explanation in the preamble of the basis and purpose of the migratory bird rule, leaving the public and the courts to guess as to the nexus between the migration of birds and Congress's power under the Commerce Clause.

1. Origin of the Test. Unlike the situation in *Riverside Bayview*, this "rule" does not involve the agency's application of its technical expertise, nor is it supported by an administrative record evidencing a thorough examination of the possible relationships between the filling of tiny waterbodies and interstate commerce.

Instead, it was sprung from the brow of one Senator who was unhappy with a jurisdictional disclaimer in Texas and wanted to make sure it would not happen again. Oversight hearings were held, and the agencies were pressed to adopt a "more proper phraseology," which claimed jurisdiction over "waters which are or could be used" by birds.[31] Eight weeks later, EPA complied, producing a legal memorandum which cited case law for the propositions that (1) "migratory birds... may be regulated under the Commerce Clause," and (2) "[t]he impact on commerce of the destruction of any one

[31] *See* Hearings on Section 404 of the Clean Water Act, July 15, 1985, Oversight *reprinted in* Environmental Policy Division, Library of Congress, *A Continuation of the Legislative History of the Fed. Water Pollution Control Act* 170 (1985).

isolated wetland need not itself be significant," and then skipped blithely to the legal conclusion that waters that "'are used or would be used' by migratory birds . . . [are] covered by EPA's regulation."[32] Missing was any discussion of the key factual predicate for such a legal conclusion – *i.e.*, whether and how the destruction of isolated wetlands affects interstate commerce. And there certainly was no discussion of the ephemeral waters *amici* deal with every day.

Letters and memoranda flew back and forth, all addressing whether the new Commerce Clause nexus required a showing of "actual use" by birds or whether it would suffice to show that an area "would be used" or "could be used" by birds,[33] but none described a factual link to commerce Ultimately,

[32] Exh. 16, Blake Memorandum, at 2, 3.

[33] *See* Exh. 17, Letter from Richard E. Sanderson, Acting Asst. Admin., External Affairs, EPA, to Hon. George J. Mitchell, U.S. Sen. (Sept. 17, 1985) (enclosing Exh. 16, Blake Memorandum); Exh. 18, Memorandum from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Dir. of Civ. Works, Dep't of the Army (Sept. 20, 1985) (enclosing Exh. 16, Blake Memorandum); Exh. 19, Letter from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Hon. George J. Mitchell, U.S. Sen. (Oct. 11, 1985); Exh. 20, Letter from Lynn A. Greenwalt, V.P., Resources Conservation Dep't, Nat'l Wildlife Fed'n, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Oct. 25, 1985) (60-day Notice of Violation letter); Exh. 22, Letter from Richard E. Sanderson, Dep. Asst. Admin. for External Affairs, EPA, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Nov. 1985) (EPA scolding Assistant Secretary of the Army regarding interpretation of Blake Memorandum); Exh. 21, Memorandum from Patrick J. Kelly, Dep. Dir. of Civ. Works, U.S. Army Corps of Engineers, Dep't of the Army, to Subcomm. on Envtl. Pollution, Comm. on Env't and Pub. Works, U.S. Sen. (Nov. 8, 1985) [hereinafter Kelly Memorandum].

the "could be used" standard prevailed,[34] which meant, according to the Corps, that "virtually all isolated waters and wetlands have been provided with an interstate commerce connection and therefore those waters and wetlands are subject to Section 404 jurisdiction."[35]

2. Lack of Findings and Jurisdictional Element. There are no Congressional findings which might assist the Court in evaluating whether the regulated activity substantially affects interstate commerce. *Morrison*, 120 S. Ct. at 1751. Of course, Congress is not obligated to make findings, nor would its findings be dispositive if it had made them. *Id.* at 1752. Whether particular activities affect interstate commerce sufficiently is a matter for this Court to decide. *Id.*

Nor is there a "jurisdictional element which would ensure, through case-by-case inquiry, that the [discharge of dredged or fill material] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. The prevailing view within the agencies seems to be that the presence of a migratory bird, or its potential presence, establishes, *ipso facto*, the requisite effect on commerce.[36] The bird test does not require the Corps to demonstrate in each case that the land-disturbing activity affects birds that have crossed State lines, or affects birds that are watched or hunted by interstate travelers, or affects the economic activity of hunters and bird-watchers.

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[34] *See* Exh. 21, Kelly Memorandum.

[35] Exh. 23, Public Not. from John F. Adams, Chief, Reg. Div., Jacksonville Dist., U.S. Army Corps of Engineers, Dep't of the Army (Mar. 12, 1986).

[36] *See, e.g.*, Exh. 16, Blake Memorandum, at 3 ("if the evidence shows that the waters 'are used or would be used' by migratory birds . . ., it is covered").

The government feels, at most, the need to show that migratory birds could use the property, not the existence in an individual case of all the links necessary to reach interstate commerce.[37] This can lead to egregious results in the West and Southwest, where the Corps asserts jurisdiction over an ephemeral wash in the desert based on the migratory bird rule without any showing that interstate travelers would come to the desert site to watch or hunt migratory birds.

The Corps may claim that the presence of interstate birds is the jurisdictional element, but it would still fail as a jurisdictional element because it does not distinguish filling activities that affect commerce from those that do not. Under the rule, any migrating bird will do. Indeed, EPA has scolded Corps officials for declining jurisdiction "based on a finding that the wetland is not used by and is not susceptible to use by migratory waterfowl," reminding them that "the commerce nexus at issue is not whether a site is used by migratory waterfowl but by migratory *birds*."[38] This is not the kind of jurisdictional element contemplated by *Lopez*, 514 U.S. at 561.

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[37] *Hoffman Homes*, 999 F.2d at 261 ("regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial"); *In re The Hoffman Group*, CWA Appeal No. 89-2, at 9 (to "demonstrate that the destruction of that waterbody will have an effect on interstate commerce . . . EPA need only show some minimal, potential effect on interstate commerce").

[38] Exh. 25, Letter from William M. Riley, Chief Water Resources Assessment Section, EPA, to Burt Paynter, Chief, Reg. Branch, Portland Dist., U.S. Army Corps of Engineers (Sept. 8, 1989) (emphasis in original).

D. Conclusion As To The Commerce Power

Congress, and certainly the Corps, lack the power under the Commerce Clause to enact the migratory bird rule. It would be unprofitable to speculate on what findings Congress might have made, because the fact is that Congress made no findings at all that would support the migratory bird rule. The rule attempts to regulate local land use not because it affects interstate commerce, but because it affects birds (which may travel interstate) and birds may affect people who engage in commerce. Under the principles recently stated in *Lopez* and *Morrison*, this is far too weak a link to constitute substantially "affecting interstate commerce."

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed, and the migratory bird rule invalidated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE STATE OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICUS* INTEREST

The State of Alabama, it should come as no surprise, takes seriously its obligation to ensure that the wildlife and wetlands its residents enjoy today remain preserved, if not indeed improved, for future generations. The people of the State demand no less.

The residents of other States share this view, as the actions of their State and local governments well attest. The States have been anything but idle in acting as responsible guardians over these essential environmental matters. *See* Appendix. Whether securing the interests of future bird watchers, future hunters, or myriad interest groups in between, the States have been diligent in protecting both interstate and intrastate wildlife and the diverse habitats they need to survive.

Why, then, does Alabama support a challenge to the migratory bird rule, whose only offense is one of jurisdiction and not of substance? In the State's view, it is precisely such well-meaning measures that risk destroying an even-greater heritage that today's government leaders have a duty to preserve and pass on—the unique benefits of divided and dispersed government. A national power to regulate in this area is not only a power to preempt but also a power to confuse. Once obtained, federal jurisdiction over these matters would authorize a federal agency to preempt all manner of local measures, thereby destroying the creative and sometimes competitive efforts of States to develop more progressive initiatives, while at the same time authorizing even the most well-intentioned federal agency to sow confusion in the people over who has plenary accountability regarding these local land-use matters. One need not be a student of, or participant in, government for long to recognize the risks of clouding responsibility over a public policy issue. Irresponsible officials like nothing more than a lack of accountability for their actions; and responsible officials have no use for policy

initiatives that they cannot control and ultimately assume well-deserved credit for developing.

It is not lost on the State that judicially enforcing these requirements of American federalism comes with a short-term cost. Congressional efforts to protect religious liberties, *City of Boerne v. Flores*, 521 U.S. 507 (1997), to regulate guns in the vicinity of schools, *United States v. Lopez*, 514 U.S. 549 (1995), to regulate the disposal of nuclear waste, *New York v. United States*, 505 U.S. 144 (1992), to provide money-damages relief for overtime work, *Alden v. Maine*, 527 U.S. 706 (1999), and to provide civil remedies for victims of gender violence, *United States v. Morrison*, 120 S. Ct. 1740 (2000), all have been reined in by the constitutionally-required balance between the dual sovereigns and the enduring check of judicial review. Yet, it is worth emphasizing, not one public-policy vacuum has emerged in any of these areas in the aftermath of these decisions. Nor does any such problem loom on the horizon. All that has become clear is that the States and their local governments retain primary initial authority over these areas, a development that ensures local accountability and what comes with it—the best long-term prospects for responsible government. Neither does a single one of these decisions permanently remove the federal backstop. Whether under section 5 of the Fourteenth Amendment or the Commerce Clause, the National Government remains available for matters that are truly national in scope at the outset or that become so if and when the States reveal an inability to handle them.

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The libertarian objective of the Framers after all was to "split

the atom of sovereignty," *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), not to multiply it. While it is assuredly difficult to uphold this federalist abstraction—even when it is the Framers' abstraction—in the face of concrete laws to remove guns from schools, to remedy gender violence or to protect migratory birds, it is doubtful whether any other branch of government is equipped to do so. For the purpose of advancing these views and of developing them further, the State of Alabama respectfully submits this *amicus curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

1. In promulgating the migratory bird rule, the Army Corps of Engineers assumed a power that Congress did not delegate to it. When it passed the Water Pollution Control Act of 1972 (the Clean Water Act), Congress gave the Corps authority to regulate just "navigable" "waters of the United States." 33 U.S.C. § 1344, 1362(7). Settled interpretations of "navigable waters," statutory context, and vital presumptions against legislatively altering the Federal-State balance all confirm that the Corps' regulatory authority under the Clean Water Act extends to waters that are in actuality navigable, that would be navigable with modest effort, or that are close to or support such waters.

The migratory bird rule, as applied to remote, man-made ponds ranging from a few inches to a few feet deep, vastly exceeds this delegation of authority. In deciding that it could enforce its permitting requirement for discharges into any body of water that is or could become a habitat for migratory birds, the Corps took on a range of authority that it is doubtful any prior agency has tried to shoulder before. As most homeowners know, migratory birds may land just about anywhere and for any reason. Under the Corps' rule, it follows, all one needs is a backyard depression or the smallest of ponds to attract such birds in spring or fall, through no

particular effort by the homeowner, and potentially to violate a criminal law the next time grass clippings or leaves are inadvertently dumped there. An attempt to delegate such sweeping authority must be clearly stated. It was not, and the rule accordingly exceeds the Corps' authority.

2. In the event Congress did in fact to delegate this astonishing authority to the Corps, the National Legislature overstepped its commerce power in doing so. An effort to regulate every isolated, temporary collection of water in the country has far too distant a connection to national commerce to be treated as a permissible regulation of intrastate activities that substantially affect interstate commerce. Every measure of constitutional excess appears in full force here.

No congressional findings, as an initial matter, support the claim that the activity substantially affects interstate commerce. From all that appears in the legislative record, Congress never discussed or seemed to have any sense that it was asserting this unique authority. Nor may after-the-fact justifications for this assumption of power (*i.e.*, bird watchers and hunters travel in and support interstate commerce) correct this deficiency. They are precisely the kinds of attenuated connections to national commerce that the Court has rejected in the past because they have no limiting principle and would convert the Federal Government from one of limited to one of uncontained powers. The interstate justifications for asserting power (bird watching and hunting) also are non-economic in nature—a type of justification that the Court has never accepted in this area before. The law, moreover, does not contain a limiting interstate-jurisdictional element. And, as with *Lopez* and *Morrison*, the law attempts to regulate an area traditionally covered by the States general police powers. In the last analysis, while Congress may well possess power to regulate many of the activities it attempted to regulate here, it failed to employ constitutionally acceptable means in this instance.

ARGUMENT

At the outset, it may be useful to clarify the parameters of dispute. Neither Alabama as *amicus curiae* nor petitioner argues that the Constitution's limited and enumerated powers disable Congress from regulating wetlands in general or migratory birds in particular. On the contrary, the National Legislature has broad powers at its disposal to do so; they simply were not permissibly invoked in this instance. Congress may, for example, use its carrot-and-stick Spending Clause powers to regulate migratory birds and wetlands. *See North Dakota v. United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). It may use its uniquely wide-ranging Treaty Clause powers, which have in fact been properly invoked to regulate migratory birds. *See Missouri v. Holland*, 252 U.S. at 430-31, 435. And, most customarily, it may use its broad Commerce Clause powers to regulate waters that in fact flow interstate or are reasonably connected to such waters, or likewise may do so with regard to commercial transactions involving animals. *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed").

Not one of these legitimate powers, however, was legitimately invoked here. And, for that reason, the migratory-bird rule must be invalidated—either because it exceeds the regulatory authority properly delegated to the Army Corps of Engineers or because as applied it exceeds Congress's authority. In either event, neither the most ardent bird-watcher nor the most aggressive hunter need be alarmed. Not only have the States understandably shown the utmost solicitude in protecting these interests, *see* Appendix, but Congress continues to have broad means at its disposal to reach these important ends.

I. The Clean Water Act Does Not Give The Corps Authority To Regulate Isolated, Intrastate Waters Merely Because They Provide A Potential Or Actual Habitat For Migratory Birds.

A careful review of the terms of the Clean Water Act together with its legislative record confirm what a brief glance at the two suggest: Congress did not engage in the debate that the Court is officiating now. At no point did the National Legislature offer any meaningful indication that the Act would delegate such free-ranging authority to the Corps, and at no point did Congress consider the constitutional implications of permitting an agency to regulate every remote intrastate body of water where birds do or may alight.

Consider initially the text of the Clean Water Act. It just gives the Corps jurisdiction over "navigable waters," 33 U.S.C. § 1344, a grant of authority that hardly suggests a desire to regulate the shallowest and most temporary of intrastate ponds. Lewis would never have directed Clark to meet him at the first "navigable water," then looked for him at every passing pond. The phrase of course suggests just the opposite, as case after case construing "navigable waters" has indicated in a series of decisions announced by this Court before Congress enacted the Clean Water Act. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971); *Railroad Co. v. Maryland*, 88 U.S. 456, 470 (1874); *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("navigable waters" refers to waters that "are navigable in fact" and that are "susceptible of being used, in their ordinary condition, as highways for commerce"); *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940) (indicating that phrase covers not only waters that are navigable in fact but also that could reasonably be made navigable through improvements). When "judicial interpretations have settled the meaning of an existing statutory provision," it has long been clear, "repetition of the same language in a new statute indicates, as a general matter,

the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). This time-tested principle of interpretation cannot co-exist with the Corps' utterly-novel and exceedingly-expansive construction.

Neither does the Act's definition of the phrase "navigable waters" fairly advance the Federal Government's position. It says that the phrase covers the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The definitional phrase ultimately suggests three readings of "navigable waters," only one of which makes interpretive sense. One, the phrase could cover any "water" in the country at all, from Lake Erie to a backyard bird bath. Two, the phrase could mean whatever the Constitution permits, which is to say it reaches the full extent of Congress's Commerce Clause powers—a line that does not pick up dead-on-arrival hypotheticals, just whatever else the Court (as opposed to Congress) decides. Three, the phrase could cover waters of the United States that are navigable in fact, that could be navigable with reasonable modification or that are reasonably connected to such waters.

The first possibility is undoubtedly an untenable one. It would read the most conspicuous jurisdictional term in the statute—"navigable"—out of the provision entirely, and would certainly raise grave and doubtful questions concerning the constitutionality of this essential piece of national legislation. *See Jones v. United States*, 120 S. Ct. 1904, 1911 (2000).

The second possibility—jurisdiction extends to whatever the Court permits—suffers from some of these problems, and more. It, too, removes "navigable" from the interpretive question. That not only violates the above interpretive principles but conventions of everyday speech as well. A definition clarifies or limits a phrase; it does not dramatically expand the phrase. This interpretation also destroys any presumption of constitutionality. No branch of government

deserves respect over an inquiry—here the reach of Commerce Clause authority—that it consciously refused to make in the first instance. This interpretation also violates the cardinal rule that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). The Federal Government seeks here exactly the opposite presumption: When Congress is silent about the jurisdictional reach of a statute over local matters, or at most speaks inscrutably about it, the legislature wishes the Court to assume that everything Congress may do, it in fact did. And this interpretation fails to respect Congress's very own proclamation in the statute. "It is the policy," the statute says, "of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

That leaves the third and most straightforward interpretation. Consistent with prior constructions of the relevant terms and consistent with the above interpretive rules, the Corps' jurisdiction remains linked to waters that are "navigable" and are "of the United States," which includes waters that are navigable in fact, that may be navigable with reasonable effort or that are reasonably connected to either of the two. This respects all of the words in the statute, comports with each of the above rules of interpretation, and avoids a serious constitutional question. *See Jones,* 120 S. Ct. at 1911.

Nor does *Chevron* deference apply here. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory ambiguity that triggers administrative deference comes at the end, not the beginning, of the statutory inquiry—which is to say, *after* the application of the above rules of statutory construction. *See Chevron*, 467 U.S. at 843 n.9. Applied here, those rules eliminate the discretion-giving ambiguity that lends *Chevron* force. More

than that, *Chevron* cannot tenably be applied in this sensitive area of Federal-State authority. It is one thing to assume that the States protect their interests in the Halls of Congress when this National body legislates explicitly, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); it is quite another to maintain this assumption when Congress legislates beneath the radar of reasonable scrutiny, leaving it to the whim of an executive branch agency to seize authority when and where it wishes. Administrative deference in this area would give *Chevron* deference a bad name. This rule should not be upheld.

II. The Regulation Exceeds Congress's Commerce Clause Powers.

The initial statutory inquiry not only avoids a serious constitutional question but also fatal one. While the Court has taken many interpretive turns in ascertaining the amount of intrastate commercial activity that will suffice to permit congressional lawmaking in this area, it has never construed the Commerce Clause to include a general police power over local crimes, local torts, local family law or local zoning and land-use matters. The Court should not do so here.

The Court has construed the Commerce Clause to permit regulation of three types of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557-59 (1995). It appears to be common ground that the bird rule is not covered by the first two safe harbors. As to the last inquiry, the Court has considered at least five factors in assessing whether regulated conduct substantially affects interstate commerce. Not one of them, however, is satisfied in this instance.

First, whether in upholding federal legislation or in invalidating it, the Court has long stood by the rudimentary principle that Congress's commerce powers are not unlimited. As a matter of first principles, the Constitution creates a Federal Government of enumerated powers, all of which—the commerce clause included—are "subject to outer limits." *Lopez*, 514 U.S. at 557. An unwavering line of precedents confirms the Court's steadfast adherence to this modest but foundational principle:

* "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

* The clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

* "The question is necessarily one of degree," and the clause applies to those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37-38.

* "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the

general powers of the government.'" *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195).

* "[T]he power to regulate commerce, though broad indeed, has limits" which "the Court has ample power" to enforce. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *over'd on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *over'd Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

* "No one disputes the proposition that the Constitution created a Federal Government of limited powers." *New York v. United States*, 505 U.S. 144, 155 (1992) (quotation omitted).

* "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

* "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist Papers* No. 45 (J. Madison)).

* The Constitution preserves the basic "distinction between what is truly national and what is truly local." *United States v. Morrison*, 120 S. Ct. at 1754.

Accordingly, the Federal Government may not justify an exercise of its commerce powers on a "rationale[ ]" that "would . . . authorize a general federal police power." *Lopez*, 514 U.S. at 564. As with other constitutional claims, a law cannot be justified by a governmental "interest" "[t]hat is precisely what" the constitutional provision at issue "forbids." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992). *See*

United States v. O'Brien, 391 U.S. 367, 377 (1968) (asserted "governmental interest [must be] unrelated to the suppression of free expression").

The migratory bird rule plainly does not comport with this first prerequisite for sustaining an exercise of Congress's commerce powers. The rule has no limiting principle, and as the facts of this case suggest it permits the Corps to regulate classically local matters, even residential property, virtually whenever it pleases. Any distinction between matters that are truly national and those that are truly local evaporates under this novel assertion of authority. *See Morrison, supra.*

Second, consistent with the economic-sounding terms of the Commerce Clause, the Court has only sustained federal regulation of intrastate activities in the setting of commercial activities. As *Morrison* confirmed just last Term: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751.

This, too, is an unyielding shortcoming of the migratory bird rule. Regulating any collection of water that is or may become a habitat for migratory birds—for the purpose of allowing bird watchers and hunters to pursue their hobbies no less—simply does not amount to commerce in any traditional sense of the word. The Court has never crossed this line before. No reasoned explanation has been offered for doing so here.

Third, the Court has asked whether the regulated activity concerns an area in which the States have traditionally exercised plenary authority under their general police powers. Land use and zoning laws, it is clear, properly have long been a local, not a national, lawmaking prerogative.

Much as the laws at issue in *Morrison* and *Lopez* covered areas traditionally regulated at the local level—schools, crime and family law—so too the Corps seeks to assert jurisdiction

over an area that is uniquely a matter of local oversight. The "regulation of land use," the Court has repeated, "is perhaps the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 767 (1982), is "traditionally a function performed by local governments," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979), and is "peculiarly within the province of state and local legislative authorities," *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). *See also Berman v. Parker*, 348 U.S. 26 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This factor also favors striking the rule.

Fourth, the Court has inquired whether the law contains a jurisdictional element, which cabins its reach to conduct that has "an explicit connection with or effect on interstate commerce." *Morrison*, 120 S. Ct. at 1750-51; *Lopez*, 514 U.S. at 562. Neither the Clean Water Act nor the migratory bird rule has any such limitation.

Fifth, while the Court has not ceded to Congress the ultimate authority to determine the reach of its commerce powers, the Court always asks whether congressional findings support the government's claim that the regulated conduct has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 562. No such findings, however, appear here. As in *Lopez*, the legislative record clangs with silence regarding the constitutional justification for passing this all-encompassing law. Nowhere in the text of the Clean Water Act or the legislative record is there the slightest indication that Congress contemplated the possibility of regulating any and all bodies of water, no matter how remote or attenuated the connection to navigable waters, that are or may become migratory-bird habitats.

Every factor the Court has considered before in gauging the validity of an exercise of commerce power counsels against upholding the migratory bird rule. It has no limiting principle. It is based on an ostensible interstate connection that is non-

commercial and non-economic. It concerns an eminently local activity—land use and zoning. It does not contain a confining jurisdictional element. And it contains not a single congressional factfinding that would reasonably support this assertion of authority. In these respects, the rule is more far-reaching than the laws invalidated in *Lopez* and *Morrison*. It deserves a similar fate.

* * *

Nor, we respectfully submit, would a decision to invalidate the migratory bird rule dishonor the inter-branch imperative that the Court accord a respectful presumption of constitutionality to the actions of the political branches—here to the views of Congress and the Army Corps of Engineers. That presumption of constitutionality, it bears emphasis, runs in two directions on occasions like this one. In controversies over the constitutional lines of authority between one politically-accountable branch and another, the Court customarily engages in zero-sum decisionmaking. One side's loss invariably becomes the other's gain. Take, for example, a horizontal separation-of-powers dispute between Congress and the President. Both deserve deference in obeying their oaths to follow the Constitution, and neither has a greater claim to the benefit of constitutional doubt than the other. The same is true of vertical separation-of-powers disputes. When the national government and local governments square off over the reach of their respective powers, Congress's aggrandizement of power customarily leads to a diminution of local power. And the opposite, of course, is true. One simply cannot give Congress the presumption of interpreting the Constitution correctly without slighting the States' capacity to do the same. It is, in short, no more aggressive to deny Congress's assertion of authority than it is an act of judicial restraint to respect a State's traditional constitutional prerogative in that same area.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

	ALABAMA	ALASKA
WETLANDS STATUTES	Code of Alabama: § 9-7-10 (1977) (Definitions) § 9-9-5 (1977) (Establishment of district) § 41-10-235 (1991) (Commemorative markers and plaques) Constitutional Amendments: Ala. Const. Amend. No. 543 (1993)	ALASKA STAT.: § 41.21.522 (Michie 1998) (Acquisitions) § 16.20.034 (Michie 1998) (Wetlands game refuge) § 41.17.950 (Michie Supp. 1999) (Definitions) § 41.21.518 (Michie 1998) (Establishment of wetlands management area) § 41.21.520 (Michie 1998) (Incompatible uses)

	ALABAMA	ALASKA
MIGRATORY BIRD STATUTES	Code of Alabama: § 9-11-244 (1997) (Taking of protected birds) § 9-11-430 (1997) (Preservation of wetlands and migratory waterfowl – definitions) § 9-11-431 (1997) (Construction of article) § 9-11-432 (Supp. 1999) (Stamp requirement for hunting migratory fowl) § 9-11-433 (Supp. 1999) (Issuance of stamp) § 9-11-434 (1997) (Revenue used in preservation of wetlands for migratory fowl) § 9-11-435 (1997) (Requirements for approving projects outside U.S.)	ALASKA STAT.: § 16.20.039 (Michie 1998) (Migratory waterfowl refuge)

	ARKANSAS	CALIFORNIA
WETLAND STATUTES	ARK. CODE ANN.: § 15-20-207 (Michie 1987) (Soil & Water Conservation Commission powers and duties) § 15-20-310 (Michie 1987) (Environmental Quality Act – acquisition of natural areas) § 15-20-705 (Michie 1987) (Scenic Resources Act – duties of agencies) § 15-20-802 (Michie 1987) (Soil & Water Conservation Commission Pooled Loan Securitization Act) § 15-21-501 (Michie 1987) (State Land Information Board – purpose)	CAL FISH & G. CODE: § 1386 (West 1998) (Riparian Habitat Conservation program) §§ 1410-1431 (West 1998) (Inland Wetlands Conservation Program Art. 1-3) §§ 1776-1796 (West 1998) (Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993) § 2620 (West 1998)(Habitat Enhancement Program) §§ 2785-2786 (West 1998) (California Wildlife Protection Act of 1990)

	ARKANSAS	CALIFORNIA
	§ 15-22-1001 (Michie 1987) – § 15-22- 1012 (Michie 1987) (Wetlands Mitigation Bank Act) § 15-57-409 (Michie 1987) (Reclamation of land) §§ 26-51-1502 (Michie 1987) - 26-51-1506 (Michie 1987) (Private Wetland & Riparian Zone Creation & Incentive) Acts 1993, No. 150, § § 1-9 (Historical Notes) Acts 1995, No. 1224 (Historical Notes)	CAL GOV. CODE: §65081.3 (West 1997) (Transportation planning and programming) §§ 66602.1 – 66682 (West 1997) (San Franciso Bay Wetlands) § 66907.12 (West 1997)(California Tahoe Conservancy) § 67675 (West 1997) (Fort Ord Reuse Authority) CAL. HARB & NAV. CODE: § 523 (West 2000 Supp.) (Removal of vessel from public waterway) § 1720 (West 2000 Supp.) (Port facility construction)

	ARKANSAS	CALIFORNIA
		CAL. HEALTH & SAFETY CODE: § 25270.5 (West 1999) (Storage of Petroleum – Inspection schedule) § 25270.11(West 1999) (Environmental Trust Fund) § 33492.93 (West 1999) (Mare Island Redevelopment Project Area) § 44470 (West 1996) (Halogenated Refrigerants) CAL. PUB.RES.CODE: § 5096.139 (West 1984) (Nejedly-Heart State, Urban, and Coastal Park Bond Act of 1976)

	ARKANSAS	CALIFORNIA
		§ 5096.197 (West 1984) (California Parklands Act of 1980) § 5096.310 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Creation and use) § 5096.347 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Sierra Nevada-Cascade Mountain Region) § 5096.350 (West Supp. 2000.) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 –Wildlife Program)

	ARKANSAS	CALIFORNIA
		§ 5096.352 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Coastal Protection Program) § 5096.357 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Fish and Game Program) §§ 5810-5818 (West 1984) (Wetlands Protection Act) § 5850 (West Supp. 2000) (San Francisco Bikeway System)

	ARKANSAS	CALIFORNIA
		§§ 5902, 5907, 5929 (West Supp. 2000) (California Wildlife, Coastal, and Park Land Conservation Act – Definitions, Expenditure of funds, Wetlands acquisition) § 6008 (West Supp. 2000) (Restriction on sale of right to use state-owned lands in Humbolt Bay) § 6890 (West Supp. 2000) (Permits and leases on state lands other than tide and submerged lands) § 8601 (West Supp. 2000) (Kapiloff Land Bank Act – Definitions) § 8602 (West Supp. 2000) (Kapiloff Land Bank Act – Legislative findings and declarations)

	ARKANSAS	CALIFORNIA
		§ 8613 (West Supp. 2000) (Kapiloff Land Bank Act – Wetlands acquisition) § 21080.23 (West Supp. 2000) (Environmental Quality – Pipeline project) § 26403 (West 1996) (Energy and Resources Fund – Programs eligible for funding) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 30116 – 30607.1(West 1996) (California Coastal Act)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 31006 (West Supp. 2000) (State Coastal Conservancy – Coastal zone) § 31162 (West 1996) (San Francisco Bay Area Conservancy Programs – Goals) §31354 (West 1996) (State Coastal Conservancy-Establishment) § 32023 (West 1996) (California Urban Waterfront Area Restoration Financing Authority Act – Definitions – Coastal zone) § 35031 (West Supp. 2000) (Coastal County and City Offshore Energy Assistance)

	ARKANSAS	CALIFORNIA
		CAL. WATER CODE: § 1707 (West Supp. 2000) (Change for purposes of preserving or enhancing wetlands) § 10633 (West Supp. 2000) (Urban Water management Plans – Content of plans) § 12565 (West Supp. 2000) (Colorado River Management Program) §12929.26 (West 1992) (Environmental Water Act of 1989 – Purposes eligible for funding) § 13142.5 (West Supp. 2000) (State Policy for Water Quality Control – Coastal Marine Environment)

	ARKANSAS	CALIFORNIA
		§ 13576 (West Supp. 2000) (Water Recycling Act of 1991) §§ 14906-14907 (West Supp. 2000) (San Joaquin Valley Drainage Relief Act) §§ 78500.4, 78684 (West Supp. 2000) (Safe, Clean, Reliable Water Supply Act – Objectives and Definitions) §§ 79080 – 79104.104 (West Supp. 2000) (Watershed Protection Program) CAL. WATER CODE APP.: § 43-26-1 (West Supp. 2000) (San Bernardino County Flood Control Act)

	ARKANSAS	CALIFORNIA
		§ 48-12 (West Supp. 2000) (Riverside County Flood Control and Water Conservation District Act) § 49-3.5 – § 49-36.5 (West Supp. 2000) (San Luis Obispo County Flood Control and Water Conservation District Act) § 136-61 (West Supp. 2000) (Antelope Valley Storm Water Conservation and Flood Control District)
MIGRATORY BIRD STATUTES	ARK. CODE ANN.: § 5-73-130 (Michie 1987) (Unlawful for guide of persons hunting migratory birds to carry a gun) § 15-41-105 (Michie 1987) (Programs for migratory waterfowl)	CAL FISH & GAME CODE: § 307 (West 1998)(Bag and possession limits) §§ 355-357 (West 1998) (Regulations pertaining to migratory birds)

	ARKANSAS	CALIFORNIA
	§ 15-42-104 (Michie 1987) (Hunting and fishing license fees) § 22-7-206 (Michie 1987) (Waterfowl and wildlife refuges) Acts 1943, No. 146 § 20 (Game and fish refuges)	§ 375 (West 1998)(Compact between AZ and CA for hunting rights) §2050 (West 1998)(Endangered Species General Provisions) §§ 3700-3706 (West 1998) (Migratory Bird Statute) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 29705 (West 1996) (Delta Protection Act of 1992 – Wildlife habitats)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 29760 (West Supp. 2000) (Delta Protection Act of 1992 – Long term resource management plan)

	COLORADO	CONNECTICUT
WETLANDS STATUTES		CONN. GEN. STAT. ANN.: § 7-131a (1999) (Conservation commissions) § 8-3c (Supp. 2000) (Zoning, housing, economic development – special permits) § 8-26 (Supp. 2000) (Zoning, housing, economic development – approval of subdivision involving wetlands) § 22a-27k (1995) (Long Island Sound account) §§ 22a-28 (1995) - 22a-45c (Supp. 2000) (Wetlands and watercourses)

	COLORADO	CONNECTICUT
		§§ 22a-91 (1995) - 22a-113a (1995) (Environmental protection – coastal management) § 22a-113o (1995) (Environmental protection -- harbor management) §§ 22a-349a (1995) - 22a-361 (1995) (Environmental protection – water resources – general permits) § 22a-363b (Supp. 2000) (Activities eligible for certificate of permission) § 22a-378a (1995) (Environmental protection – general permits for minor activities)

	COLORADO	CONNECTICUT
		§§ 22a-403 (Supp. 2000) - 22a – 411(1995)(Environmental protection – Dams and reservoirs – permits) § 22a – 477 (Supp. 2000) (Clean Water Fund) § 23-65k (1990) (Municipal regulation of forest practices) § 25-68d (1990) (Certification of activity affecting the floodplain) § 25-102ww (1990) (Applications affecting Shepaug and Bantam River) § 25-102xx (1990) (Model river protection ordinance) §§ 25-204 (1990) - 25-206 (1990) (River corridor protection plan)

	COLORADO	CONNECTICUT
		§§ 25-234 (1990) - 25-236 (1990) (Multiple use rivers – management plan) § 26-17a (1990) (Acquisition and preservation of tidal wetlands)
MIGRATORY BIRD STATUTES	COLO. REV. STAT.: § 33-1-115 (West 1998) (Migratory birds)	CONN. GEN. STAT. ANN.: § 26-27c (1990) (Reproduction of migratory bird stamp) § 26-48a (1990) (Management of migratory game birds) § 26-91 (1990) (Taking of migratory game birds)

	DELAWARE	DISTRICT OF COLUMBIA
WETLANDS STATUTES	DEL. CODE ANN. tit.: 7 § 4001 (1991) (Erosion and Sedimentation Control – legislative findings) 7 § 6036 (1991) (Environmental control – projects of state significance) 7 § 6601 (1991) - tit. 7 § 6620 (1991) (Wetlands Act) 7 § 7004 (Supp. 1998) (Coastal Zone Act – uses allowed by permit) 9 § 2656 (Supp. 1998) (Quality of Life Act – elements of plan) 9 § 4956 (Supp. 1998) (Quality of Life Act – elements of plan)	

	DELAWARE	DISTRICT OF COLUMBIA
	9 § 6956 (Supp. 1998) (Quality of Life Act – elements of plan)	
MIGRATORY BIRD STATUTES	DEL. CODE ANN. tit.: 7 § 707 (Supp. 1998) (Hunting or shooting from a motor vehicle) 7 § 717 (Supp. 1998) (Frightening or harassing migratory birds)	D.C. CODE ANN.: § 22 – 1628 (1996) (Game and fish Laws)

	FLORIDA	GEORGIA
WETLANDS STATUTES	FLA. STAT. ANN.: §163.3177 (West 2000) (Land development) § 163.3178 (West 2000) (Land development – coastal management) §187.201 (West 2000) (Planning & development – state comprehensive plan including preservation of wetlands) §253.36 (West 1999) (Title to reclaimed wetlands) §258.501 (West 1999) (Myakka river Wild & Scenic Designation Preservation Act) §338.250 (West Supp. 2000) (Central Florida Beltway mitigation)	GA. CODE ANN.: §12-2-8 (1996) (Protection of natural resources) §12-5-30 (1996) (Control of water pollution & surface-water use) §12-5-472 (1996) (Water supply)

	FLORIDA	GEORGIA
	§369.255 (West 2000) (Aquatic plant control) §369.305 (West 2000) (Wekiva River Protection) §369.307 (West 2000) (Wekiva River Protection) §373.4145 (West 2000) (Management and storage of surface waters) §373.421 (West 2000) (Management and storage of surface waters) §373.4211 (West 2000) (Management and storage of surface waters) §375.031 (West 2000) (Land acquisition and conservation)	

	FLORIDA	GEORGIA
	§376.121 (West 2000) (Pollutant Discharge Prevention & Removal) §380.0552 (West 2000) (Environmental land and water management) §380.061 (West 2000) (Florida Quality Developments Program) §403.061 (West 1998) (Pollution Control) §403.927 (West 1998) (Use of water in farming and forestry activities) §403.9328 (West 1998) (Alteration & trimming of mangroves) §403.9332 (West 1998) (Mitigation and enforcement)	

	FLORIDA	GEORGIA
MIGRATORY BIRD STATUTES	FLA. STAT. ANN.: §372.5712 (West 2000) (Waterfowl permit revenues) §372.5714 (West 2000) (Creation of waterfowl advisory Council)	GA. CODE ANN.: §27-1-6 (1997) (Game and Fish – powers and duties of department) §27-2-20 (Supp. 1999) (Federal Migratory Bird conservation stamp)

	HAWAII	IDAHO
WETLANDS STATUTES	HAW. REV. STAT. ANN.: § 174C-3 (Michie 1993) (Water and land development – definitions) §342E-1 (Michie 1993) (Nonpoint source pollution management & control – definitions)	IDAHO CODE: §39-7407 (1998) (Idaho Solid Waste Facilities Act – site certification)
MIGRATORY BIRD STATUTES		IDAHO CODE: §36-105 (Supp. 1999) (Fish & Game Commission orders) §36-201 (1994) (Classification of wildlife)

	ILLINOIS	INDIANA
WETLANDS STATUTES	20 ILL. COMP. STAT. ANN. 830/1-2 (West 1993) - 830/3-6 (West 1993) (Interagency Wetland Policy Act) 30 ILL. COMP. STAT. ANN. 150/3 (West 1993) (Natural Heritage Fund Act – purpose) 70 ILL. COMP. STAT. ANN.1832/20 (West Supp. 2000) (Mid-America Intermodal Authority Port District Act) 210 ILL. COMP. STAT. ANN. 95/2 (West 1993) (Campground Licensing & Recreational Act) 505 ILL. COMP. STAT. ANN. 35/1-3 (West 1993) (Illinois Conservation Enhancement Act)	IND. CODE ANN.: §14-12-2-1 (West 1998) (Indiana Heritage Trust Program – purpose) §14-12-2-4 (West 1998) (Indiana Heritage Trust Program – "project" defined) §14-26-2-16 (West 1998) (Lake preservation – applicability to water supply reservoirs) §14-30-2-22 (West 1998) (Maumee River Basin Commission – powers pertaining to property)

	ILLINOIS	INDIANA
	520 ILL. COMP. STAT. ANN. 25/10 (West Supp. 2000) (Habitat Endowment Act) 525 ILL. COMP. STAT. ANN. 33/5 (West Supp. 2000) (Illinois Open Land Trust Act) 525 ILL. COMP. STAT. ANN. 33/10 (West Supp. 2000) (Illinois Open Land Act – definitions) 525 ILL. COMP. STAT. ANN. 35/14 (Natural Areas Acquisition Fund)	
MIGRATORY BIRD STATUTES	5 ILL. COMP. STAT. ANN. 580/ 1 (West 1993) (Consent for acquisition of land) 30 ILL. COMP. STAT. ANN. 105/5.151. (West 1993) (State Migratory Waterfowl Stamp Fund)	IND. CODE ANN.: §14-8-2-162 (West 1998) (Natural & cultural resources – definitions) §14-22-6-2 (West 1998) (Regulation of migratory birds)

	ILLINOIS	INDIANA
	515 ILL. COMP. STAT. ANN. 5/1-230 (West 1993) (Wildlife & Fish Fund) 520 ILL. COMP. STAT. ANN. 5/1.3 (West 1993) (Authority to regulate the taking of wildlife) 520 ILL. COMP. STAT. ANN. 5/1.28 (West 1993) (Migratory Waterfowl Stamp Fund) 520 ILL. COMP. STAT. ANN. 5/1.29 (West 1993) (Migratory Waterfowl Stamp Fund) 520 ILL. COMP. STAT. ANN. 5/2.4 (West 1993) (Birds of prey) 520 ILL. COMP. STAT. ANN. 5/2.18-1 (West 1993) (Migratory Game Birds)	§14-22-6-3 (West 1998) (Migratory birds – permit or license required) §14-22-7-1 (West 1998) (Migratory waterfowl defined) §§ 14-22-7-2 (West 1998) - 14-22-7-5 (West 1998) (Migratory waterfowl stamp) §14-22-33-1 (West 1998) (Migratory birds – effect of federal laws)

	ILLINOIS	INDIANA
	520 ILL. COMP. STAT. ANN. 5/2.19 (West 1993) (Migratory waterfowl – protective regulations) 520 ILL. COMP. STAT. ANN. 5/2.33 (West 1993) (Game protective regulations) 520 ILL. COMP. STAT. ANN. 5/3.. - 5/3.2 (West Supp. 2000) (Licenses and Permits required for the taking of migratory waterfowl) 520 ILL. COMP. STAT. ANN. 5/3.6 (West 1993) - 5/3.8 (West Supp. 2000) (Migratory waterfowl hunting area permits)	

	IOWA	KANSAS
WETLANDS STATUTES	IOWA CODE ANN.: §§ 314.23 - 314.24 (West 1997) (Environmental protection of wetlands during highway construction or maintenance) §352.1 (West 1994) (County Land Preservation & Use Commissions – purpose) §352.4 (West 1994) (County Land Preservation & Use Commissions – county inventories) §352.5 (West 1994) (County Land preservation and use plan)	KAN. STAT. ANN.: §32-807 (1993) (Dept. of Wildlife & Parks – organization & powers) §32-839 (1998) (Steve Lloyd Wetlands designation) §32-846 (1998) (Approval of agreement & lease for Milford lake wetlands)

	IOWA	KANSAS
	§455A.15 (West 1997) (Dept. of Natural Resources Resource Enhancement & Protection – legislative findings) §455B.448 (West 1997) (Solid waste disposal) §456B.1 (West 1997) (Definitions – wetlands) §456B.11 (West 1997) (Agriculture drainage wells –wetlands— conservation easements) §456B.12 (West 1997) (Inventory of protected wetlands) §456B.13 (West Supp. 2000) (Protection of wetlands) §456B.14 (West 1997) (Civil penalty for violating wetland protection statutes)	

	IOWA	KANSAS
MIGRATORY BIRD STATUTES	IOWA CODE ANN.: §481A.48 (West 1999) (Restrictions on hunting or killing game birds and animals) §481B.1 (West 1999) (Endangered plants & wildlife – definitions) §484A.1 (West 1999) (Migratory game bird – definition) §484A.2 (West 1999) (Migratory game bird fee) §484A.4 (West 1999) (Use of revenue from migratory game bird fees) §484A.5 (West 1999) (Migratory waterfowl project approval requirement)	KAN. STAT. ANN.: §32-939 (1993) (Migratory waterfowl habitat stamp) §32-989 (1993) (Service charge for migratory waterfowl habitat stamp) §32-993 (1993) (Migratory waterfowl propagation & protection fund) §32-1008 (1993) (Migratory birds – defined)

	IOWA	KANSAS
	§484A.6 (West 1999) (Penalty for violating migratory waterfowl provisions) §484B.4 (West Supp. 2000) (Hunting preserves)	

	KENTUCKY	LOUISIANA
WETLANDS STATUTES	KY. REV. STAT. ANN.: § 146.550 (Banks-Baldwin 1996) (Wetlands – definition) § 146.555 (Banks-Baldwin 1996) (Natural Resources & Environmental Protection Cabinet Heritage Land Conservation – legislative finding) § 146.565 (Banks-Baldwin 1996) (Acquisition of natural areas & wetlands) § 224.60-137 (Banks-Baldwin Supp. 1998) (Underground storage facilities)	LA. CONST. Art. 7, § 10.2 (Supp. 2000) (Wetlands Conservation & Restoration Fund) LA. REV. STAT. ANN.: § 30.25 (West Supp. 2000) (Closure of production pits in the wetlands) § 30:907 (West Supp. 2000) (Surface Mining & Reclamation Act) § 30:2073 (West 2000) (Louisiana Water Control Law – Definitions) § 30:2074 (West 2000) (Secretary of environmental quality – powers & duties)

	KENTUCKY	LOUISIANA
		§ 34:3103 (West Supp. 2000) (Offshore Terminal Authority – jurisdiction) § 34:3473 (West Supp. 2000) (Millennium Port Authority – jurisdiction) § 38:18 (West 1989) (Dept. of Public Works – conference with wildlife & fisheries commission) §§ 49:213.1 (West Supp. 2000) - 49:213.22 (West Supp. 2000) (Wetlands Conservation & Restoration Authority – creation, management, funding, etc.)

	KENTUCKY	LOUISIANA
		§§ 49:214.1 (West Supp. 2000) - 49:214.6 (West Supp. 2000) (Louisiana Coastal Wetlands Conservation & Restoration Program) §§ 49:214.21 (West Supp. 2000) - 49:214.42 (West Supp. 2000) (Louisiana Coastal Management Program) § 56:266 (West Supp. 2000) (Louisiana Fur & Alligator Public Education & Marketing Fund) §§ 56:281 (West Supp. 2000 - 56:284 (West Supp. 2000) (Nutria control cost-sharing) § 56:579.1 (West Supp. 2000) (Permitting of mariculture in the coastal zone)

	KENTUCKY	LOUISIANA
MIGRATORY BIRD STATUTES	KY. REV. STAT. ANN.: § 146.560 (Banks-Baldwin 1996) (Kentucky Heritage Land Conservation Fund Board) § 150.330 (Banks-Baldwin 1996) (Migratory birds; waterfowl) § 150.340 (Banks-Baldwin 1996) (Limit on possession – migratory birds) § 150.600 (Banks-Baldwin 1996) (Taking of waterfowl – permits & fees) § 150.603 (Banks-Baldwin 1996) (Waterfowl or migratory game bird permit required)	LA. REV. STAT. ANN.: § 47:305.43 (West Supp. 2000) (Exemptions on taxes for nonprofit organizations dedicated to the conservation of migratory waterfowl) § 56:8 (West Supp. 2000) (Wildlife & Fisheries Commission – Definitions) § 56:10 (West Supp. 2000) (Wildlife & Fisheries Commission – annual report to governor) § 6:118 (West Supp. 2000) (Migratory game bird violations) §§ 56:150 (West Supp. 2000) - 56:156 (West Supp. 2000) (Louisiana Duck Stamp Program)

	MAINE	MARYLAND
WETLANDS STATUTES	ME. REV. STAT. ANN. tit.: 12 § 685-B (West Supp. 1999) (Maine Land Use Regulation Commission) 12 § 4751 - 12 § 4758 (West 1994) (Wetlands – zoning) 12 § 6022 (Marine Resources – Dept. Administration – commissioner's appointment, duties & powers) 12 § 8876-A (West Supp. 1999) (Forest Resource Assessment Program) 30-A § 4312 (West 1996) (Growth Management Program) 38 § 419-B (West Supp. 1999) (Pollution control)	MD. CODE ANN., [Environment]: §§ 5-901 (1996) - 5-908 (1996) (Nontidal Wetlands) §§ 5-909 (Supp. 1999) - 5-910 (Supp. 1999) (Nontidal Wetlands) § 5-911 (1996) (Nontidal wetlands) §§ 16-101 - 16- 503 (1996) (Wetlands & Riparian Rights) §§ 16-104, 16-202, 16-205, 16-307 (Supp. 1999) (Wetlands & Riparian Rights) MD. CODE ANN., [Natural Resources]: § 3-306 (Supp. 1999) (Power Plant Research Program)

	MAINE	MARYLAND
	38 § 435 (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 436-A (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 439-A (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 480-A (West 1989) - 38 § 480-Z (West Supp. 1999) (Environmental Protection Board – Protection of Natural Resources) 38 § 636 (West Supp. 1999) (Permits for hydropower projects) 38 § 840 (West Supp. 1999) (Dam registration & abandonment) 38 § 951 (West Supp. 1999) - 38 § 963 (West 1989) (Saco River Corridor)	§ 5-1217 (1997) (Acceptance of gifts of land or wetlands) §§ 5-1502 (1997) - 5-1504 (1997) (Heritage Conservation Fund) § 8-404 (1990) (Scenic & Wild Rivers Review Board & Related Program) §§ 8-1201 (1990) - 8-1210 (1990) (Nontidal Wetlands – legislative findings, goal of statewide program established, etc.) §§ 8-1807 (Supp. 1999) - 8-1808.7 (Supp. 1999) (Chesapeake bay Critical Area Protection Program)

	MAINE	MARYLAND
	38 § 1901 (West 1989) (Coastal Barrier Resources System – findings & declaration of policy) 38 § 2001 (West Supp. 1999) (Coastal & lake watershed districts – districts authorized) 38 § 2007 (West Supp. 1999) (Coastal & lake watershed districts – powers)	
MIGRATORY BIRD STATUTES	ME. REV. STAT. ANN. tit.: 12 § 753 (West 1994) (State consent to the U.S. to acquire national forests) 12 § 7001 (West Supp. 1999) (Inland Fisheries & Wildlife – definitions) 12 § 7109 (West Supp. 1999) (Migratory waterfowl permit)	MD. CODE ANN., [Natural Resources]: § 10-308.1 (Supp. 1999) (Migratory waterfowl stamp) § 10-402 (Supp. 1999) (Hunting & taking nests & eggs of wild and migratory birds)

	MAINE	MARYLAND
	12 § 7407 (West 1994) (Migratory waterfowl hunting)	§ 10-407 (Supp. 1999) (Open season for wetland game birds, wild waterfowl, and other migratory birds regulated by federal rule)

	MASSACHUSETTS	
WETLANDS STATUTES	MASS. GEN. LAWS ANN.: ch. 12, § 11D (West 1996) (Creation of division of environmental protection in the dept. of the attorney general) ch. 21A, § 2 (West 1994) (Executive Office of Environmental Affairs – duties & functions) ch. 21C, § 7 (West Supp. 2000) (Massachusetts Hazardous Waste Management Act) ch. 30, § 61 (West Supp. 2000) (Environmental impact of projects conducted by agencies) ch. 40, § 8C (West 1999) (Powers of cities to create conservation commissions)	

	MASSACHUSETTS	
	ch. 78A, § 3 (West 1996) (Youth Conservation & Service Corps – activities include wetlands protection) ch. 92, § 107A (West Supp. 2000) (Degradation of watershed) ch. 111, § 150A ½ (West Supp. 2000) (Standards & criteria for siting of facilities) ch. 130, § 105 (West Supp. 2000) (Protection of coastal wetlands) ch. 131, § 40 (West Supp. 2000) (Removal, fill, dredging or altering of land bordering waters) ch. 131, § 40A (West 1991) (Protection of inland wetlands)	

	MASSACHUSETTS	
	ch. 164, § 69J ¼ (West Supp. 2000) (Petitions to construct generating facilities – wetlands impact) ch. 214 § 7A (Damage to environment – remedy & procedure)	
MIGRATORY BIRD STATUTES		

	MICHIGAN	MINNESOTA
WETLAND STATUTES	MICH. COMP. LAWS. ANN: §§ 324.30104 – 324.30323 (West 1999) (Habitat Protection, Inland Waters – Wetland Protection) § 324.60904 (West 1999) (Land resource inventory; format; contents; wetland protection)	2000 Minn. Sess. Law Serv. Ch. 382 (West) (Natural Resources – Wetland Regulation) 1995 Minn Laws § 84.0895 (Supp. 2000)(Department of Natural Resources – Protection of threatened and endangered species) 1997 Minn Laws § 97A.145 (Wetlands for wildlife) 1997 Minn Laws § 103F.601 (Waterbank Program) 1997 Minn Laws § 103A.202 (Wetland Policy) 1997 Minn. Laws § 103B.3355 (Wetland functions for determining public values)

	MICHIGAN	MINNESOTA
		1997 Minn Laws §§ 103F.511, 103F. 516, 103F.535 (Reinvest in Minnesota Resources Act – Wetland Provisions) 1997 Minn. Laws §§103F.612 – 103F.616 (Wetland Preservation Areas.) 1997 Minn Laws §§ 103F.901-103F. 905 (Wetland Establishment and Restoration Program) 1997 Minn Laws §§ 103G.221 – 103G.237 (Waters of the State – Wetlands) 1999 Minn Laws § 275.295 (Taxes – Wetlands exemption) 1999 Minn Laws § 282.018 (Forfeited Land Sales Prohibited or Limited Sales – Wetlands)

	MICHIGAN	MINNESOTA
MIGRATORY BIRD STATUTES	MICH. COMP. LAWS. ANN: § 324.36501 (West 1999) (Endangered Species Protection – Definitions) § 324.43525 (West 1999) (Waterfowl hunting license)	

	MISSISSIPPI	MISSOURI
WETLANDS STATUTES	2000 MISS. LAWS. Ch. 516 (Coastal Wetland Protection Act) MISS CODE ANN: §§ 49-27-13 – 49-27-67 (1999) (Coastal Wetland Protection Act) § 17-17-151 (1999) (Hazardous Waste Management Facility – Application for permit) § 17-17-229 (1999) (Nonhazardous Solid Waste Planning Act of 1991) § 29-15-1 (1999) (Public Trust Tidelands) § 29-15-5 (1999) (Littoral and riparian rights) § 49-15-9 (1999) (Seafood – Riparian Rights)	MO. ANN. STAT. § 21.475 (1969) (Wetland committee created) § 644.037 (2000) (Nationwide permit – certification without conditions of application to impacts on wetlands)

	MISSISSIPPI	MISSOURI
	§ 49-15-301 (1999) (Mississippi Commission on Marine Resources) § 57-15-5 (1999) (Marine Resources – General Policies and Functions)	
MIGRATORY BIRDS STATUTES	MISS CODE ANN.: § 49-7-1 (1999) (Hunting and Fishing – Definitions)	MO. ANN. STAT.: § 252.244 (Supp. 2000) (Wild game – preparation and service)

	MONTANA	NEBRASKA
WETLANDS STATUTES	MONT. CODE ANN.: § 2-15-3405 (1999) (Appointment of wetlands advisory council)	NEB. REV. STAT.: § 39-1320 (1998) (State highways) 2000 Neb. Laws 957
MIGRATORY BIRD STATUTES	MONT. CODE ANN.: § 87-1-305 (1999) (Fish & game refuges)	NEB. REV. STAT.: § 37-229 (Supp. 1999) (Game birds – defined) § 37-233.01 (Supp. 1999) (Migratory waterfowl defined) § 37-902 (1998) (Migratory bird reservations)

	NEVADA	
WETLANDS STATUTES	NEV. REV. STAT.: § 244.388 (Supp. 1999) (Establishment, use & operation of wetlands mitigation bank)	
MIGRATORY BIRD STATUTES	NEV. REV. STAT.: § 503.584 (1995) (Conservation, protection, & propagation of selected species – legislative findings) § 328.195 (Supp. 1999) (Conditions for state consent to federal acquisition of land for wildlife refuge) § 503.620 (1995) (Protection of birds included in Migratory Bird Treaty Act)	

	NEW HAMPSHIRE	NEW JERSEY
WETLANDS STATUTES	N.H. REV. STAT. ANN.: § 21-0:5-a (Supp. 1999)(Wetlands Council) § 21-0:14 (Supp. 1999) (Environmental services – Administrative Appeals) § 79-A:2 (1991) (Taxation – definitions) § 310-A:76 (1995) (Certified wetland scientist) §§ 482-A:1 (Supp. 1999) – 482-A: 27 (Supp. 1999)(Fill and Dredge in Wetlands Act) § 483:10 (1992)(Rivers Corridor Management Plans)	1987 N.J. LAWS 2A:35A-3 (Environmental Rights) 1998 N.J. LAWS 4:27-12 (Aquaculture development – freshwater wetlands) 1998 N.J. LAWS 4:27-13 (Aquaculture development – coastal wetlands) 1991 N.J. LAWS 13:1D-29 (Construction permits - definitions) 2000 supp. N.J. LAWS 13:1D-101 (Permit application checklist; permit defined)

	NEW HAMPSHIRE	NEW JERSEY
	§ 483-A:7 (1992)(Lakes Management and Protection Plans) § 483-B:2 (1992)(Comprehensive Shoreland Protection Act) § 485-A:29 (Supp. 1999)(Water Pollution and Waste Disposal – sewage disposal system)	2000 supp. N.J. LAWS 13:1D-120 (Permit application review – Legislative findings and declarations) 2000 supp. N.J. LAWS 13:1D-121 (Permit application review – definitions) 2000 supp. N.J. LAWS 13:1D-126 (Department of Environmental protection – Enforcement of certain violations – definitions) 2000 supp. N.J. LAWS 13:1D-129 (Department of Environmental protection – Enforcement of certain violations – Rules and Regulations)

	NEW HAMPSHIRE	NEW JERSEY
		1991 N.J.LAWS 13:1E-57 (Solid waste management) 2000 supp. N.J.LAWS 13:8C-24 (Garden State Preservation Trust) 1991 N.J.LAWS 13:19-19 (Coastal Protection – Application of Wetlands Act) 2000 supp. N.J. LAWS 13:9C-1 – 13-9C:4 (Wetlands Mitigation Council) 1991 N.J. LAWS 13:9A-1 – 13:9A-10 (Coastal Wetlands Protection Act) 1991 N.J.LAWS 13:9B-1 – 13:9B-30 (Freshwater Wetlands Protection Act)

	NEW HAMPSHIRE	NEW JERSEY
		2000 supp. N.J.LAWS 40:55D-132 (Extension of permits – Definitions) 2000 supp. N.J.LAWS 40:55D-134 (Extension of permits – extension of project exemptions – freshwater wetlands) 1992 N.J.LAWS 58:16A-60 (Flood hazard areas, inapplicability to lands regulated by Wetlands Act of 1970)
MIGRATORY BIRD STATUTES	N.H. REV. STAT. ANN.: § 207:1 (1989) (Fish and Game Commission – Definitions) § 209:6 (1989)(Federal Duck Stamp Required) § 209:6-b (1989)(Rules Relative to Migratory Birds)	1998 N.J.LAWS 4:27-11(Prevention of predation at aquaculture sites by endangered and nongame species) 2000 supp. N.J.LAWS 23:3-1g (Fee for hunting migratory birds)

	NEW HAMPSHIRE	NEW JERSEY
	§ 209:8-a(1989)(Game Birds –Exceptions) § 214:1-d (Supp. 1999)(Licenses) § 214:9 (Supp. 1999)(Licenses – fees)	1997 N.J.LAWS 23:3-75 – 23:3-81 (New Jersey Waterfowl Stamp Act) 1997 N.J.LAWS 23:4-1 (Open and close seasons) 1997 N.J.LAWS 23:4-3 (Bag limit for migratory birds) 1997 N.J.LAWS 23:4-18 (Hunting migratory waterfowl)

	NEW MEXICO	NEW YORK
WETLANDS STATUTES	1978 N.M. LAWS § 75-8-2 (Wetlands Area Restoration)	NY ENVIR. CONSERV.: § 3-0301 (McKinney 1997) (Department of Environmental Conservation) §§ 24-0101 – 24-1305 (McKinney 1997)(Freshwater Wetlands Act) §§ 25-0101 – 25-0601 (McKinney 1997) (Tidal Wetlands Act) § 47-0107 (McKinney 1997) (County and regional environmental management councils) § 49-0205 (McKinney 1997) (State Land Acquisition)

	NEW MEXICO	NEW YORK
		§ 51-0701 (McKinney 1997) (Land Preservation and improvement project – allocation of moneys) § 51-0705 (McKinney 1997) (Land Preservation and improvement project – approval and execution of state projects) § 51-0709 (McKinney 1997) (Land Preservation and improvement project – Approval of municipal wetlands restoration projects) § 51-0711 (McKinney 1997) (Land Preservation and improvement project – Contracts for municipal wetlands restoration projects)

	NEW MEXICO	NEW YORK
		§ 51-0713 (McKinney 1997) (Land Preservation and improvement project – Restriction of alienation of wetlands) § 52-0101 (McKinney 1997) (Environmental Quality Bond Act – Definitions) § 56-0101 (McKinney Supp. 2000) (Clean water/Clean air Bond Act of 1996) § 70-0107 (McKinney 1997) (Environmental Conservation Law – Uniform Procedures) § 70-0117 (McKinney 1997) (Environmental Conservation – special provisions) § 70-2303 (McKinney 1997) (Environmental Conservation Law – Violation – penalties)

	NEW MEXICO	NEW YORK
		§ 70-2307 (McKinney 1997) (Environmental Conservation Law – Abatement of pollution) § 71-2507 (McKinney 1997) (Pollution of Tidal Wetlands)
MIGRATORY BIRD STATUTES	1978 N.M. LAWS § 17-1-14 (General powers and duties of state game commission)	NY ENVIR. CONSERV. § 11-0307 (McKinney 1997) (Migratory game birds – regulation)

	NORTH CAROLINA	NORTH DAKOTA
WETLAND STATUTES	N.C CONST Art.14 § 5 (1973)(Conservation of natural resources) N.C. GEN STAT.: §113-230 (1999) (Orders to control activities in coastal wetlands) § 113A-113 (1999)(Areas of Environmental concern) § 113A-120 (1999)(Grant or denial of permits) §§ 143-214.8 – 143-214.13 (1999) (Wetlands Restoration Program)	N.D.CENT. CODE: § 20.1-02-17.1 (Supp. 1999) (Procedures and conditions for land acquisition for wildlife and fish restoration) §§ 61-32-01 – 61-32-06 (1995) (Wetlands Act) § 61-32-07 (Supp. 1999) (Wetlands Act) § 61-32-08 - 61-32-10 (1995) (Wetlands Act)
MIGRATORY BIRD STATUTES	N.C. GEN STAT.: § 113-129 (1999)(Wildlife resources – Definitions) § 113-270.2 (1999) (Hunting licenses)	N.D.CENT. CODE: § 20.1-03-25 (1991) (Hunting by nonresidents)

	NORTH CAROLINA	NORTH DAKOTA
	§ 113-270.2B (1999) (Voluntary migratory waterfowl conservation print) § 113-270.3 (1999) (Special activity licenses; big game kill reports) § 113-291.1 (1999)(Manner of taking wild animals and wild birds)	

	OHIO	OKLAHOMA
WETLANDS STATUTES	OHIO REV.CODE ANN.: § 1533.101 (Supp. 1999) (Reissued licenses and permit fees) §1533.112 (Supp. 1999) (Wetlands Habitat Stamps)	OKLA. STAT.: 2 § 9-205.3 (Supp. 2000) (Oklahoma Concentrated Animal Feeding Operations Act) 27A § 3-2-108 (1997) (Wetlands management strategy) 80 § 1 (1995)(State's consent to acquisition of lands by the United States)
MIGRATORY BIRD STATUTES	OHIO REV.CODE ANN.: § 1531.021 (Supp. 1991) (Sunday hunting prohibited) § 1533.101 (Supp. 1991) (Reissued licenses and permit fees)	OKLA. STAT.: 29§ 5-406 (1991) (Protected Game – Migratory Birds)

	OREGON	PENNSYLVANIA
WETLAND STATUTES	OR. REV. STAT.: § 196.600 (Supp. 1990) (Wetlands and rivers – definitions) §§ 196.605 – 196.660 (Supp. 1990) (Wetlands Mitigation Banks) §§ 196.668 – 196.687 (Supp. 1990) (Wetland conservation plans) § 197.279 (Supp. 1990) (Approved wetland conservation plans) § 215.418 (Supp. 1990) (Approval of development on wetlands) §§ 537.015 – 537.022 (1999) (Registration of water for wetland, stream or riparian restoration or storm water management)	2000 supp. PA CODE § 4212 (Aquacultural development – wetlands)

	OREGON	PENNSYLVANIA
MIGRATORY BIRD STATUTES		1997 PA CODE § 2103 (Game or wildlife protection)

	RHODE ISLAND	SOUTH CAROLINA
WETLAND STATUTES	R.I GEN. LAWS: §§ 2-1-18 – 2-1-24 (1998) (Fresh Water Wetlands) § 23-27.3-600 (1997) (State building code – fresh water wetlands)	S.C. CODE ANN: § 47-20-10 (Supp. 1999) (Confined Swine Feeding Operations – Definitions) §§ 48-39-10 – 48-39-355 (Supp. 1999) (Environmental protection and conservation – Coastal tidelands and wetlands)

	RHODE ISLAND	SOUTH CAROLINA
MIGRATORY BIRD STATUTES	R.I. GEN LAWS: § 20-2-34 (1998) (Fish and wildlife – licensing – definitions) § 20-2-35 (1998) (Fish and wildlife – licensing – Waterfowl stamp required)	S.C. CODE ANN: §1-30-75 (Supp. 1999) (Department of natural resources) § 50-9-510 (Supp. 1999) (licenses authorized for sale) § 50-9-530 (Supp. 1999) (Migratory waterfowl stamps; fees) § 50-11-20 (Supp. 1999) (Definitions; migratory waterfowl committee)

	SOUTH DAKOTA	TENNESSEE
WETLANDS STATUTES	S.D CODIFIED LAWS § 1-41-3.2 (Michie Supp. 2000)(Office of agricultural policy created)	TENN.CODE ANN.: §§ 11-14-401 (1999) – 11-14-407 (1999)(Natural Areas Protection Fund – wetlands)
MIGRATORY BIRD STATUTES	S.D CODIFIED LAWS § 41-1-1(Michie Supp. 2000)(Game, fish, parks and forestry – definitions and general provisions) § 41-3-6 (Michie 1991)(Assent to federal acquisition of property for migratory bird conservation)	TENN.CODE ANN.: § 70-5-111 (1995) (Federal wildlife refuges in the state)

	TEXAS	UTAH
WETLANDS STATUTES	TEX. HEALTH & SAFETY CODE ANN.: § 361.099 (West 1992) (Prohibition on permit for Hazardous Waste Management Unit in Wetlands) TEX NAT. RES. CODE ANN.: § 33.203 (West 2000 supp.) (Management of coastal public land – definitions) §§ 33.231 – 33.237 (West 2000 supp.) (Coastal Wetlands Acquisition Act) §§ 221.001 – 221.044 (West 2000 supp.) (Wetland mitigation)	

	TEXAS	UTAH
	TEX PARKS & WILD. CODE §§ 14.001 – 14.002 (West 2000 supp.) (Parks and wildlife department powers and duties concerning wetlands) TEX. WATER CODE §§ 11.501 – 11-506 (West 2000) (Wetlands Act)	
MIGRATORY BIRD STATUTES	TEX PARKS & WILD. CODE § 41.003 (West 1991) (Reciprocal License Agreements: Border States) § 43.154 (West 1991) (Hunting and fishing licenses – permits to control wildlife protected by this code)	UTAH CODE ANN.: § 23-21-6 (1998)(Acquisition of lands by the United States for migratory bird refuges)

	VERMONT	VIRGINIA
WETLANDS STATUTES	VT STATE ANN. tit. 10 § 902 (1998) (Soil and Water Conservation, Flood Control – Definitions) § 905b (Supp. 1999) (Soil and Water Conservation, Water Resource Management – Department of Environmental Conservation – Duties; Powers) § 1272 (1998) (Water Pollution Control – Regulation of activities causing discharge or affecting significant wetlands) VT STATE ANN. tit. 24 § 4303 (Supp. 1999) (Municipal and Regional Planning and Development – General Provisions; Definitions)	VA CODE ANN.: §§ 28.2-1300 – 28.2-1320 (Michie 1997) (Wetlands Act) § 33.1-223.2:1 (Michie 1996) (Wetlands mitigation banking) § 58.1-3666 (Michie Supp. 1998) (Wetlands and riparian buffers)

	VERMONT	VIRGINIA
MIGRATORY BIRD STATUTES	VT STATE ANN. tit. 10 § 1424a (1998)(Soil and Water Conservation; Flood Control – Outstanding resource waters) § 4277 (1997) (Fish and Wildlife Conservation – Migratory Waterfowl stamp program)	VA CODE ANN.: § 29.1-340 (Michie 1997) (Hunting waterfowl from unlicensed blinds and without season license) § 29.1-349 (Michie 1997) (Hunting, erecting blind within 500 yards of licensed blind) § 29.1-350 (Michie 1997) (Exemption from application of article)

	WASHINGTON	WEST VIRGINIA
WETLAND STATUTES	WASH. REV. CODE ANN.: § 90.84.005 (Supp. 2000) (Findings—purpose—intent of wetlands mitigation statute) § 90.84.010 (Supp. 2000) (Definitions) § 90.84.020 (Supp. 2000) (Authority for regulating) § 90.84.030 (Supp. 2000) (Submission of proposed rules to legislative committees) § 90.84.040 (Supp. 2000) (Certification of banks) § 90.84.050 (Supp. 2000) (Approval of use of credits by the departments)	W.VA. CODE : § 22-11-3 (1998) (Water Pollution Control Act – Definitions)

	WASHINGTON	WEST VIRGINIA
	§ 90.84.060 (Supp. 2000) (Interpretation of chapter) § 90.84.070 (Supp. 2000) (Application to public and private mitigation banks) § 90.84.900 (Supp. 2000) (Severability) § 36.32.570 (1991) (Conservation area acquisition and maintenance) § 47.12.3330 (Supp. 2000) (Advanced environmental mitigation) § 76.09.350 (Supp. 2000) (Multispecies landscape management plans) § 79A.05.775 (Supp. 2000) (Preservation of river wetlands)	

	WASHINGTON	WEST VIRGINIA
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	WASHINGTON	WEST VIRGINIA
MIGRATORY BIRDS STATUTES	WASH. REV. CODE ANN.: § 77.08.045 (Supp. 2000) (Defines migratory waterfowl)	W.VA. CODE : § 20-1-2 (Supp. 1999) (Definitions) § 20-2-63 (1996)(Migratory waterfowl stamp) § 20-2B-9 (Supp. 1999) (Conservation stamp; purposes)

	WISCONSIN	WYOMING
WETLAND STATUTES	2000 Wisc. Legis. Serv. Act 147 (West 1999) (Wetlands Act) WISC. STAT.: § 1.13 (Supp. 2000) (Land Use and Planning activities) § 61.351 (2000) (Villages – Zoning of wetlands in shorelands) § 62.231 (2000) (Cities – Zoning of wetlands in shorelands) § 66.0295 (2000) (Comprehensive Planning) § 281.165 (Supp. 2000) (Compliance with water quality standards for wetlands)	Wyo. Stat. Ann.: § 35-11-308 - 35-11-311 (1999) (Wetlands Act) § 35-11-103 (Supp. 2000) (Definitions)

	WISCONSIN	WYOMING
	§ 281.22 (1999) (Fees for water quality determinations for wetlands)	
MIGRATORY BIRD STATUTES	WISC. STAT: § 29.364 (Supp. 2000) (Definition of migratory birds)	

FOR ARGUMENT

Supreme Court, U.S.
FILED
JUL 27 2000
OFFICE OF THE CLERK

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO BRIEF OF THE SERRANO WATER DISTRICT; THE IMPERIAL IRRIGATION DISTRICT; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT; THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT; THE WESTERN COALITION OF ARID STATES; THE WESTERN GROWERS ASSOCIATION; TEJON RANCH; AND THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

VIRGINIA S. ALBRECHT
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July 27, 2000

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Exhibit 24: U.S. Army Corps of Engineers/EPA, Correspondence Related to *Draft Guidance for Clean Water Act Jurisdiction Over Isolated Waters* (Oct. 30, 1987).

- Letter from C. G. Goad, Chief, Operations and Readiness Div., U.S. Army Corps of Engineers, to John Meaghar, Aquatic Resource Div., EPA (May 23, 1986).
- Letter from David G. Davis, Director, Office of Wetlands Protection, EPA, to John P. Elmore, Chief, Operations and Readiness Div., U.S. Army Corps of Engineers (Aug. 28, 1987).
- Letter from Peter J. Offringa, Brigadier General, Deputy Director of Civil Works, U.S. Army Corps of Engineers, to David G. Davis, Director, Office of Wetlands Protection, EPA (Oct. 30, 1987) (enclosing *Draft Guidance for Clean Water Act Jurisdiction Over Isolated Waters*).

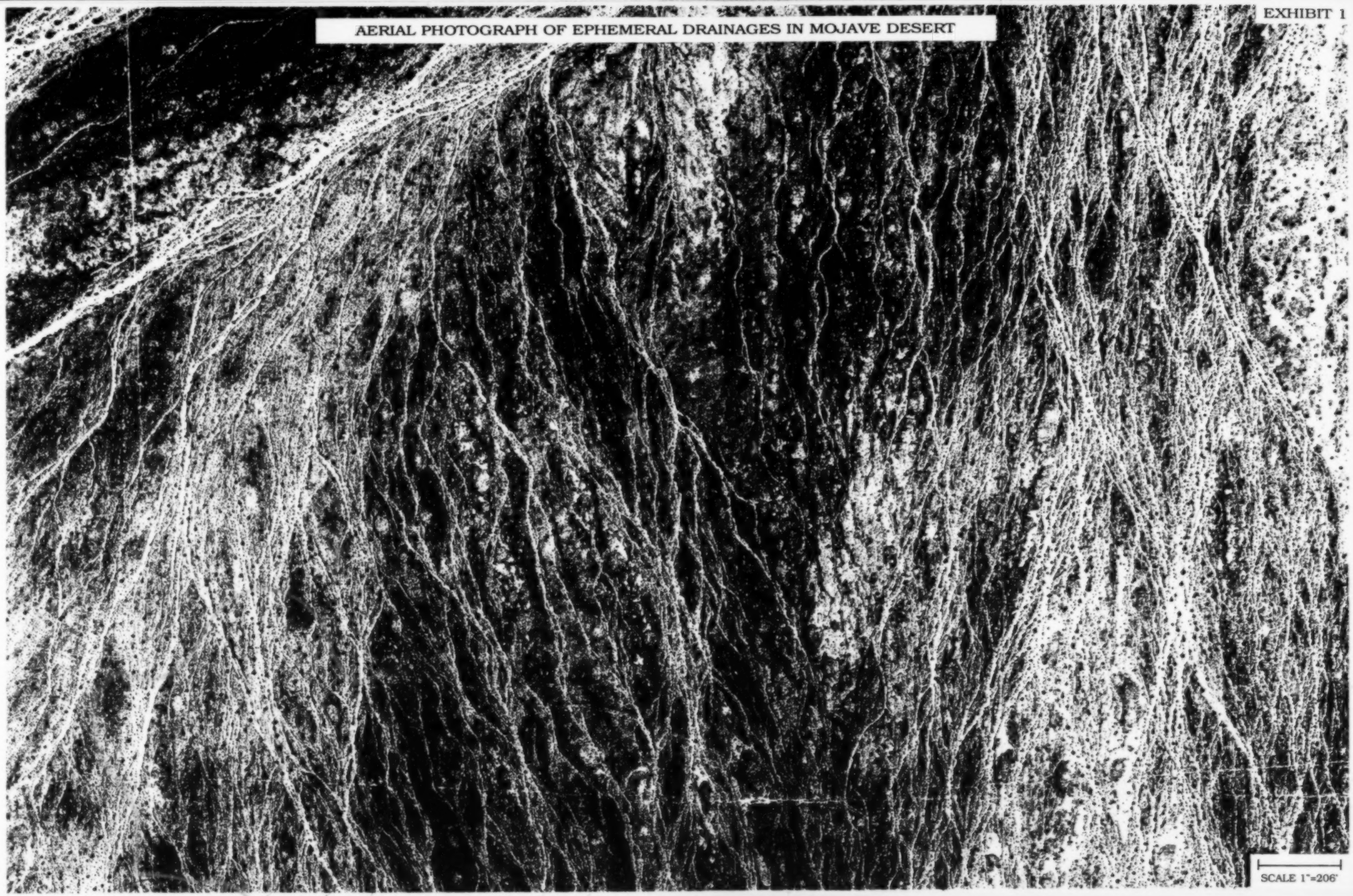
Exhibit 25: Letter from William M. Riley, Chief, Water Resources Assessment Section, EPA, to Burt Paynter, Chief, Regulatory Branch, Portland Dist., U.S. Army Corps of Engineers, Dep't of the Army (Sept. 8, 1989).

Exhibit 26: EPA/Dep't of Army, *Guidance for Clean Water Act Jurisdiction Over Isolated Waters in Light of* Tabb Lakes v. United States (Jan. 24, 1990).

Exhibit 27: Letter from R. O. Buck, Assistant Director of Civil Works, Dep't of the Army, to Hon. Owen Pickett, U.S. House of Representatives 1 (Feb. 2, 1994).

EXHIBIT 1

AERIAL PHOTOGRAPH OF EPHEMERAL DRAINAGES IN MOJAVE DESERT



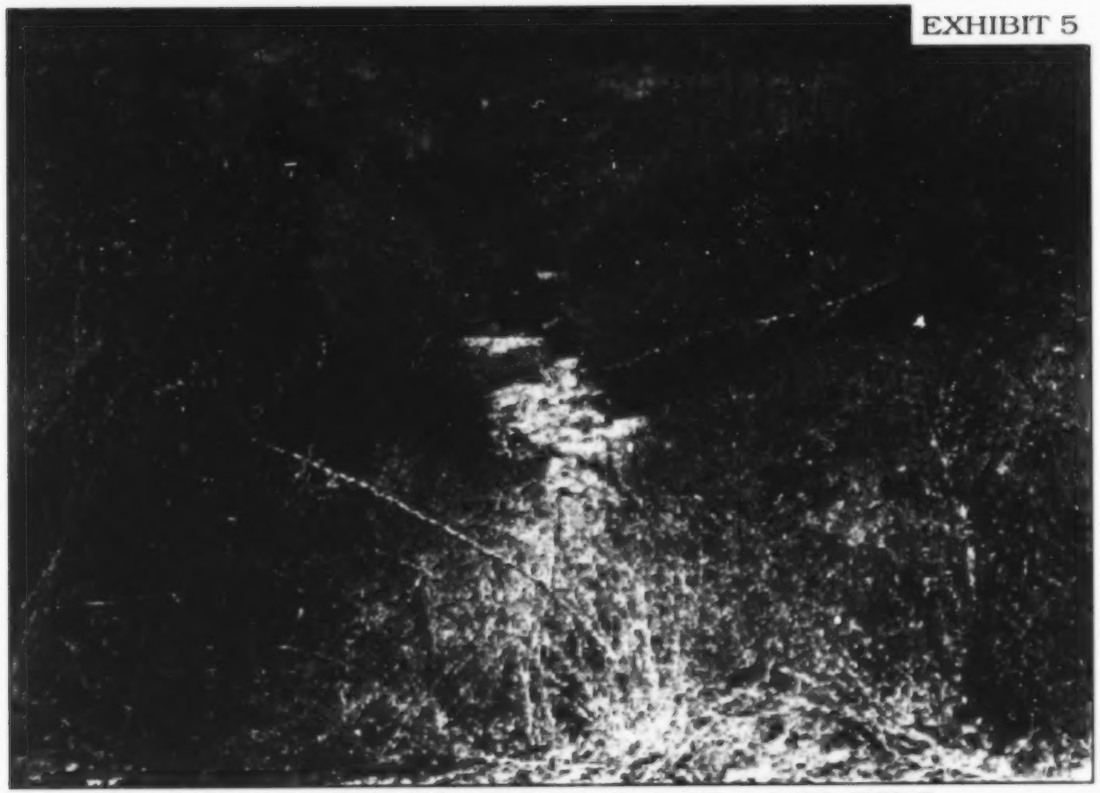
Figures 1 and 2: Jurisdictional Drainage in Ventura County, California; and Jurisdictional Desert Wash near Palm Springs, California

Figures 3 and 4: Jurisdictional Desert Wash near Desert Springs, California; and Jurisdictional Drainages within Eroded Canyons between Rolling Hills in San Clemente, California

CORPS DELINEATION IN ORANGE COUNTY, CALIFORNIA

SCALE 1"=200'

EXHIBIT 5



GROUND-LEVEL PHOTOGRAPHS OF 1-2 FT. WIDE
JURISDICTIONAL EPHEMERAL DRAINAGES IN EXHIBIT 4

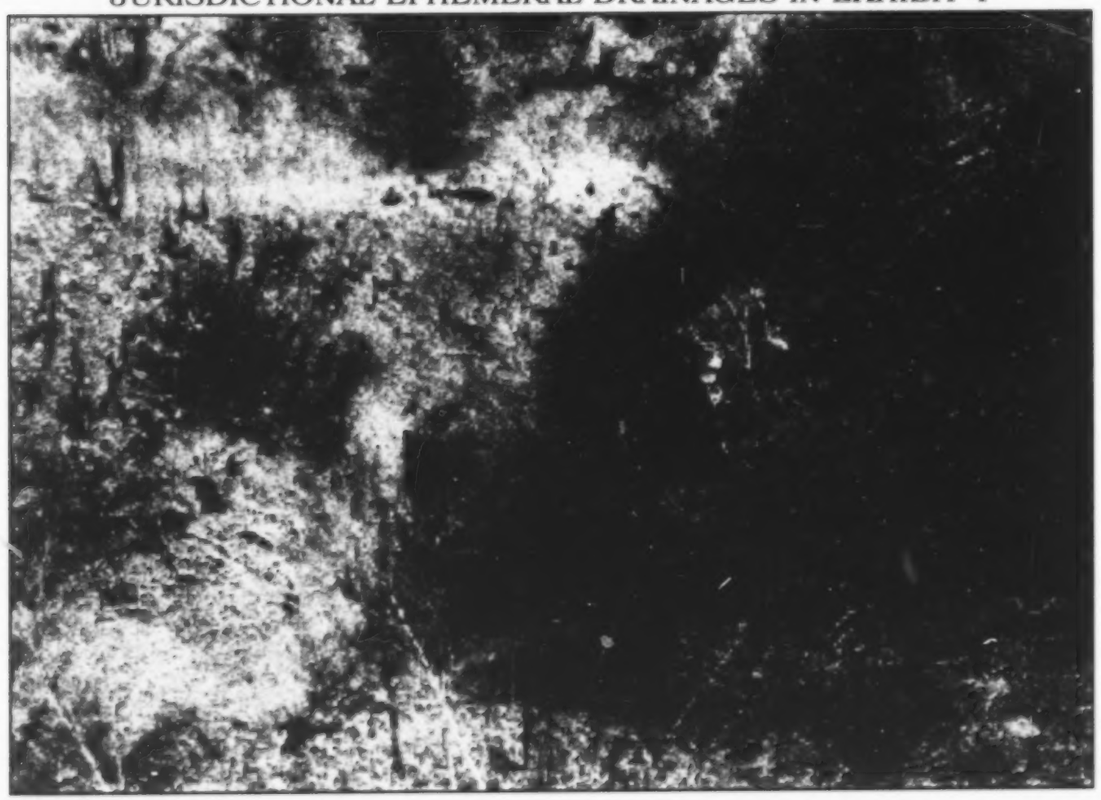
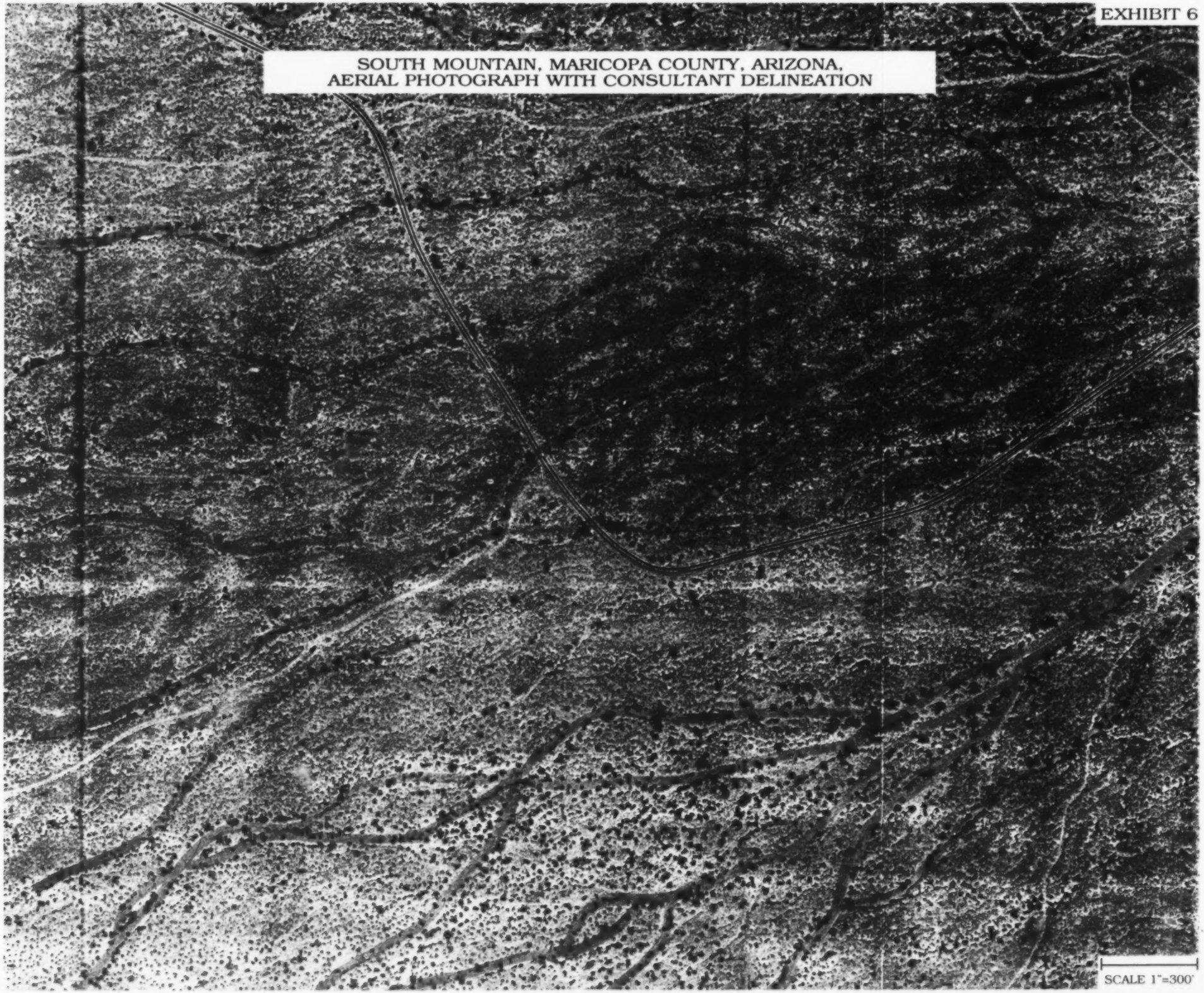


EXHIBIT 6

SOUTH MOUNTAIN, MARICOPA COUNTY, ARIZONA,
AERIAL PHOTOGRAPH WITH CONSULTANT DELINEATION



SCALE 1"=300'

EXHIBIT 7

GROUND-LEVEL PHOTOGRAPHS OF 40 FT. WIDE EPHEMERAL DRAINAGE IN EXHIBIT 6

Wash Flow And Rainfall Data For Maricopa County, Arizona*

July 2000

Wash Name	Location	Approximate Watershed Size in Square Miles	FCDMC Rainfall Gauge Number (1)	FCDMC Wash Flow Gauge Number (2)	Period of Measurement	Total Number of Flow Events During the Period of Measurement (3)	Average Depth of Flow Per Event in Feet	Average Total Elapsed Flow Time Per Event in Hours	Estimated Jurisdictional Width of Wash in Feet	Total Number of Rain Events During the Period of Measurement (4)
South Mountain Fan	Phoenix, AZ	2.3	6560	6563	6/9/93 to 7/10/00	5	1.7	1.4	40	182
Estrella Fan	Goodyear, AZ	1.1	6890	6893	4/30/93 to 7/10/00	4	0.4	N/A	70	203
North Heights Dam	Fountain Hills, AZ	1.9	5980	5983	10/11/96 to 7/10/00	15	N/A	N/A	30	120
Flying E Wash	Wickenburg, AZ	8	7080	7083	7/12/94 to 7/10/00	39	0.9	N/A	N/A	198

* Prepared by Jack Moody, PE, Arizona Registration No. 22208, from Flood Control District of Maricopa County records.

(1) Rainfall gauges are located near the wash gauges.

(2) Wash flow gauges are located in the low-flow channel of the wash and maintained by the FCDMC.

(3) All wash flow events as small as 1.2 inches deep are recorded, and the data are transmitted electronically to the FCDMC.

(4) A "rain event" is defined as a single rainfall measuring 1 millimeter (0.04 inches) of rain or greater over a 24-hour period. On average, there are 37 additional rainfall events each year that have less than 1 millimeter (0.01 to 0.03 inches) of rain.

EXHIBIT 8

EXHIBIT 9

DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
ARIZONA-NEVADA AREA OFFICE
3636 NORTH CENTRAL AVENUE, SUITE 760
PHOENIX, ARIZONA 85012-1936

REPLY TO
ATTENTION OF

Office of the Chief
Regulatory Branch

November 1998

File Number:

Dear Mr.

Reference is made to your letter of , in which you inquired as to the jurisdictional limits of Section 404 of the Clean Water Act for

The Section 404 jurisdictional limits are indicated by the ordinary high water mark and/or wetland boundary designated on the enclosed aerial photograph or map. This jurisdictional determination will remain in effect for five years from the date of this letter unless an unusual flood event occurs. After this five year period or after an unusual flood event alters stream conditions, the Corps of Engineers reserves the authority to retain the original jurisdictional limits or to establish new jurisdictional limits as conditions warrant.

Although your delineation has been completed, we would ask that on future requests, in addition to a proposed delineation, you include two unmarked copies of a recent vintage aerial photograph. Preferably the aerial photograph scale should be a minimum of 1":100' and should accurately depict the current field conditions. The project area boundary should be marked on the photograph, but the waterways should not be obscured by any marks. I am enclosing a copy of our "Minimum Requirements for Obtaining a Section 404 Clean Water Act Delineation" for your future reference.

Any discharge of dredged or fill material within the designated jurisdictional area requires a permit from the Corps of Engineers under Section 404 of the Clean Water Act. The Corps of Engineers emphasizes avoidance of the delineated jurisdictional area. Please review this delineation and evaluate your proposed activity to ensure that avoidance of the jurisdictional area is given full consideration in your design. Any work outside the designated jurisdictional area does not require a Section 404 permit.

Please include a copy of this letter and the corresponding jurisdictional delineation with any application to the Corps of Engineers for a Section 404 permit.

The receipt of your letter is appreciated. If you have questions, please contact .

Sincerely,

Chief, Arizona Section
Regulatory Branch

Enclosure(s)

Project Name:
Location:
Project Number:
Engineer: Date:

TABLE 1
Jurisdictional Waters of the U.S.

Description	Measured L, inches	Avg Width ft	Length ft	Area ft²	Area acres
Sheet 1	4.5	50	900	45,000	1.03
	14.3	6	2,860	17,160	0.39
	2	4	400	1,600	0.04
	3.7	3	740	2,220	0.05
	45.8	15	9,160	137,400	3.15
	8	4	1,600	6,400	0.15
	14	3	2,800	8,400	0.19
	1.8	3	360	1,080	0.02
	7.3	3	1,460	4,380	0.1
	8.3	3	1,660	4,980	0.11
	3.8	5	760	3,800	0.09
	11.5	6	2,300	13,800	0.32
	3.7	15	740	11,100	0.25
Sheet 2	8.75	8	1,750	14,000	0.32
	8.1	15	1,620	24,300	0.56
	7.5	12	1,500	18,000	0.41
	6.7	10	1,340	13,400	0.31
	5.5	8	1,100	8,800	0.2
	3.25	3	650	1,950	0.04
	6.5	3	1,300	3,900	0.09
	3.9	3	780	2,340	0.05
	11.6	25	2,320	58,000	1.33
	19.4	20	3,880	77,600	1.78
	8.4	15	1,680	25,200	0.58
	2.9	6	580	3,480	0.08
	6.3	4	1,260	5,040	0.12
	2.75	3	550	1,650	0.04
	19.8	8	3,960	31,680	0.73
	0.75	3	150	450	0.01
	1.5	12	300	3,600	0.08
	0.5	10	100	1,000	0.02
	3.3	6	660	3,960	0.09
Sheet 3	2.8	3	560	1,680	0.04
	6	8	1,200	9,600	0.22
	4.8	6	960	5,760	0.13
	15.5	8	3,100	24,800	0.57
	7	4	1,400	5,600	0.13
	3.5	10	700	7,000	0.16
	11.4	6	2,280	13,680	0.31
	8.75	4	1,750	7,000	0.16
	17	5	3,400	17,000	0.39
	17	3	3,400	10,200	0.23
	11.25	5	2,250	11,250	0.26

Total Jurisdictional Waters of the U.S.: 15.33

885 F.2d 866 (Table)
30 ERC 1510, 20 Envtl. L. Rep. 20,008
Unpublished Disposition
(Cite as: 885 F.2d 866, 1989 WL 106990 (4th Cir.(Va.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

TABB LAKES, LTD., a Virginia corporation, Plaintiff-Appellee,
v.
UNITED STATES of America, Henry E. Hudson, United States Attorney, Lee M. Thomas, Administrator, Environmental Protection Agency, James M. Seif, Administrator, Environmental Protection Agency, John O. Marsh, Jr., Secretary of the Army, Elvin R. Heiberg, III, Chief, Army Corps of Engineers, Charles E. Williams, North Atlantic Division Engineer; J.J. Thomas, Norfolk District Manager, Defendants-Appellants.

No. 89-2905.

Argued July 24, 1989.
Decided Sept. 19, 1989.
E.D.Va., 715 F.Supp. 726.

AFFIRMED.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Senior District Judge. (CA-87-635-N)).

David Carlisle Shilton (Donald A. Carr, Acting Assistant Attorney General, Dirk D. Snel, Michael D. Rowe, Department of Justice, Russel Petit, Office of Chief Counsel, U.S. Army Corps of Engineers, Dov Weitman, Office of General Counsel, U.S. Environmental Protection Agency on brief) for appellant.

Richard Russell Nageotte (Nageotte & Borinsky, P.C. on brief) for appellee.

Before DONALD RUSSELL, WIDENER, and K.K. HALL, Circuit Judges.

PER CURIAM:

**1 This is an action for a declaratory judgment by a landowner that his property located in York County, Virginia is not within the coverage of Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1251, et seq. The plaintiff moved for summary judgment on the pleadings and submitted affidavits in support. The ground of its motion was that under the Act the defendants had no jurisdiction over its land. The defendants, on the other hand, moved for summary judgment on the ground that jurisdiction under the Act was evident. The district court, in an excellent opinion, denied the defendants' motion for summary judgment and sustained that of the plaintiff's. The defendants have appealed.

The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In discharge of this responsibility the Act prohibits the discharge of pollutants into the Nation's waters. Included in this responsibility was "an interim goal of water quality which [would] provide[ ] for the protection and propagation of fish, shellfish, and wildlife ... by July 1, 1983." To accomplish the broad purposes of the Act, it was said to be "essential that discharge of pollutants be controlled at the source." Accordingly, the Act in 33 U.S.C. § 1344 provided for a permit program for the discharge of dredged or fill material into "navigable waters" and devolved the responsibility of developing and administering such program on the Corps of Engineers. The statute defined "navigable waters" as "waters of the United States" without any more specific identification of the term. Initially, the Corps of Engineers construed the Act as covering only waters navigable in fact. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123. Responding to complaints from environmentalists, the Corps finally in 1983, issued regulations defining "waters of the United States" in these words:

(3) All other waters such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs,

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prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce....

Congress became concerned that there was no specific provision protecting migratory birdlife. After considerable discussion between Congressional leaders and the agency, General Kelly, acting on behalf of the Department and Corps, issued a letter in the form of a directive to all officers of the Corps of Engineers, in which he specified, among others, this new standard for indicating as sufficient interstate commerce connection to warrant exercise of jurisdiction in the Corps over isolated waters and wetlands. This new identifying standard was:

**2 Waters which are used or could be used as habitat by other migratory birds which cross state lines.

The issue posed by this appeal is whether this added provision is of a character requiring prior notice and opportunity for comment under 5 U.S.C. § 553 before it becomes valid. The resolution of that issue, as the parties concede, depends on the determination whether the Memorandum issued by General Kelly in behalf of the Secretary and Commanding General of the Corps qualifies as an interpretative rule or general policy statement as under the recognized exception to the requirements of Section 553 of prior notice and opportunity to respond. See Section 533(b)(3)(A). The district court carefully reviewed this issue and concluded that the exception did not apply and that the Kelly Memorandum represented a new material addition to the coverage of the Clean Water Act requiring prior notice and opportunity to comment. See also Jerri's Ceramic Arts v. Consumer Product Safety Comm., 874 F.2d 205 (4th Cir.1989). It accordingly granted the landowner's petition for a declaratory judgment to that effect and entered judgment accordingly. We affirm on the district court's opinion. Tabb Lakes, Ltd. v. United States of America, C/A No. 87-635-N (E.D.Va. Nov. 7, 1988).

AFFIRMED.

K.K. HALL, Circuit Judge, dissenting:

I agree with the majority that the only issue of this appeal is whether or not the Corps' new provision regarding the use or potential use of waters by migratory birds meets the interpretive rule exception to 5 U.S.C. § 533(b)(3)(A). Because I believe that it does, I respectfully dissent.

Section 553 of the Administrative Procedures Act ("APA") creates an exception to the APA's requirement of notice-and-comment rule-making for rules which are merely "interpretive." 5 U.S.C. § 533(b)(3)(A). While the application of this exception has led to much judicial consternation, there is general agreement that rules which are explanatory and "simply state what the administrative agency thinks the statute means" fit the exception. Jerri's Ceramic Arts v. Consumer Products Safety, 874 F.2d 205, 207 (4th Cir.1989). Conversely, rules which implement a statute and create new legal obligations are substantive and must be promulgated pursuant to the notice-and-comment procedures of the Act. United Technologies Corp. v. E.P.A., 821 F.2d 714, 718-20 (D.C.Cir.1987). Although recognizing these principles, the district court found the provision in question to be substantive largely because it had a "significant effect on public interests." This holding is in error.

The significance of a rule's impact has no place in the determination of whether it is substantive or interpretive. See American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 707 F.2d 548, 560 (D.C.Cir.1983), citing 2 K. Davis, Administrative Law Treatise, § 7:8 at 39 (2d Ed.1979). The touchstone of a substantive rule is its creation of new legal obligations. This the Corps' migratory bird provision does not do.

**3 The majority's holding to the contrary notwithstanding, this regulation did not impose new legal obligations by expanding jurisdiction under the Clean Water Act ("CWA"). 33 U.S.C. § 1251 et seq. CWA coverage was set by Congress and

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extends to all "waters of the United States." 33 U.S.C. § 1362(7). The Corps could not have expanded on this definition for the simple reason that Congress intended that the statute be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S.Conf.Rep. 1236, 92nd Cong., 2d Sess. 144 (1972); 1 1972 Legislative History at 281, 327. This regulation merely explains the Corps' interpretation of what contacts with interstate commerce are sufficient to bring a given wetland within the jurisdictional reach of the CWA. Furthermore, under the CWA, the Corps does not have the authority to promulgate rules affecting its jurisdiction. Consequently, even if the Corps wanted to promulgate a substantive rule on this point, [FN1] it could not. See Postal Workers, 707 F.2d at 558. (A rule cannot possibly be substantive unless an agency has been delegated authority to promulgate such a rule.)

FN1. As we have previously noted, in deciding whether a given rule is interpretive, the agency's intent should be considered. Jerri's Ceramics, 874 F.2d at 208. Here it is clear that the Corps intended this regulation to be interpretive. When it was published in the Federal Register, the Corps made clear that its purpose was to "clarify" the definition of "waters of the United States" so as to "clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." 51 Fed.Reg. 41217. Plainly, the Corps intended the rule to be nothing more than an explanation of present practices.

For the above-stated reasons, I conclude that the migratory bird provision is an interpretive rule that is exempt from the notice-and-comment procedures of the APA. Consequently, the Corps properly relied upon it in determining that it had jurisdiction over the Tabb Lakes property. Accordingly, I would reverse the district court on this point and remand for further proceedings on the merits of the jurisdiction issue. [FN2] Because the majority fails to do this, I dissent.

FN2. In this regard, the record shows that Tabb Lakes' property is not used by migratory water fowl such as ducks or geese, but rather, indicates the presence of migratory robins and finches. On remand, the district court should determine whether the use or potential use of the property by these types of birds provide a sufficient nexus between the property and interstate commerce to bring it within CWA jurisdiction. I am doubtful that it does; however, this is a close question. It is also a question that involves issues of fact appropriate for the district court in the first instance.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 30

In the matter of National Pollutant Discharge Elimination System permit for City of Ely, Nevada, Docket No. 141-24(w), the Presiding Officer has certified an issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Whether the discharge from the City of Ely, Nevada sewage treatment plant into Murry Creek constitutes a discharge into "navigable waters" as that term is defined in §502(7) of the Federal Water Pollution Control Act.

Answer

Based upon the facts presented in the stipulation agreed to by EPA's Regional Office, Region IX, and the City of Ely, 1/ the discharge in question is not a discharge into "navigable waters."

Discussion

The term "navigable waters" is defined in Section 502(7) of the Federal Water Pollution Control Act as "waters of the United States,

1/ A copy of the stipulation is attached as an appendix to this Decision.

including the territorial seas." That term was explained in an earlier opinion of this office as meaning "that pollution of waters covered by the bill must be capable of affecting interstate commerce". EPA, A Collection of Legal Opinions, Vol. I at 295 (1975). 2/ This basic test was elaborated somewhat in 40 C.F.R. §125.1(o):

> (o) The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

2/ See Leslie Salt v. Froehlke, 7 ERC 1311, 1314 (N.D. Cal. 1974):

> We conclude that the Congress, enacting the FWPCA, was exercising its powers under the commerce clause to combat pollution of the nation's waters; that water pollution unquestionably affects interstate commerce and that, therefore, it was a proper exercise of the commerce power to require permits for dredging or filling which are potential causes of pollution of waters of the United States . . . .

Accord, United States v. Holland, 6 ERC 1388, 1392-93 (M.D. Fla. 1975); of course, the statute does not require proof that "a particular discharge or stream has a discernable [sic] interstate effect." United States v. Ashland Oil, 6 ERC 1991 (W.D. Ky. 1973) aff'd, 504 F. 2d 1317, 7 ERC 1114 (6th Cir. 1974). The possibility of such an effect is sufficient.

> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by interstate commerce.

This definition is inclusive rather than exclusive. Accordingly, there may be "waters of the United States" which are not specifically included within its scope. However, the definition provides a useful starting point.

The relevant facts are as follows: the City of Ely operates a sewage treatment plant on the Georgetown Ranch, north of Ely, Nevada. The plant discharges into Murry Creek, which is directed into irrigation ditches immediately downstream from the discharge plant. Under normal conditions, no water from the irrigation ditches leaves the Georgetown Ranch, and is unlikely to do so even during snowmelt or heavy rainfall. There is nothing in the stipulation to indicate that even were any water to flow off of the Georgetown Ranch property during such an event it would thereafter enter another body of water. Occasionally, part of Georgetown Ranch is leased to farmers for cattle grazing, and cattle from Utah have grazed on the ranch and subsequently been returned to Utah.

None of the tests in 40 C.F.R. §125.1(o) appear to be met by this factual situation. The facts indicate that Murry Creek is not navigable in fact, nor is it a tributary of any waters, navigable or otherwise. It crosses no State lines. The Stipulation does not indicate that fish or shellfish are present in Murry Creek or if so, that they are taken from the Creek and sold in interstate commerce. The waters

downstream of the discharge point are not used for any industrial purpose. 3/ Finally, I do not think that cattle from Utah are the sort of "interstate travelers" the regulation drafters had in mind, even were they (the cattle) to refresh themselves regularly with draughts of City of Ely sewage effluent.

Apart from the regulation, it could be argued that the pasturage of interstate cattle could affect commerce. While this possibility exists, the potential effect is remote indeed. More importantly, this argument ignores the character of the irrigation network as a land disposal system. All the effluent from the plant is contained entirely on the Georgetown Ranch, which appears to be owned by the City of Ely.4/ If

3/ A number of the facts in the stipulation relate to the character and uses of Murry Creek upstream from the discharge point. These facts are irrelevant to the legal determination because, except in stagnant water (which Murry Creek is not), discharges of pollutants do not affect commerce upstream from the discharge point. Thus our decision here is confined to the discharge in question and the portion of Murry Creek downstream of that discharge. We express no opinion as to the legal status of Murry Creek from its origin to its entry onto the Georgetown Ranch property.

4/ The fact that ownership of land surrounding a body of water is consolidated in one legal entity is not in itself dispositive of the issue of whether that water constitutes "waters of the United States" within the meaning of Section 502(7). What is significant here is that the water is contained on the property (i.e., there is no discharge from the water on the Georgetown Ranch to another stream or lake) and the absence of any of the uses of the water described in 40 C.F.R. §125.1(o)(4), (5) or (6).

the Utah cattle were sufficient to turn this irrigation/land disposal scheme into navigable waters, then by analogy, if a farmer allowed fishermen from another State to fish his small farm pond, the pond would become "navigable waters." Although EPA should give the term "navigable waters" its "broadest possible constitutional interpretation",5/ neither law nor reason supports extension of that term to cover these facts.

Dated: SEP 18 1975

General Counsel

5/ Conference Rept. on S.2770, Rept. No. 92-1236, 92d Cong., 2d Sess, at 144 (1972).

GENERAL COUNSEL OPINION
No. 77-5

April 21, 1977

Cooling Ponds as Navigable Waters

Federal Water Pollution Control Act — Cooling ponds as "navigat waters" — Artificial ponds built for cooling and located on property of utility are "cooling ponds," whether or not used for recreational pu poses — Effluent limitations guidelines apply only to cooling pon which are navigable waters; where use of pond is limited to residents State, then pond is not "navigable waters" and limitations do not appl — If in the future pond is used by interstate travelers, pollutant discharged therein would fall under Section 502(12) and therefore woul be subject to NPDES permit requirements under Section 402 of the Act

This is in response to your letter of September 15, 1976 as well as letter of January 10, 1977 to Mr. Stanley W. Legro, concerning the G cooling Pond. I sincerely apologize for not having answered your sooner.

EPA regulations concerning both NPDES permits and effluent limit guidelines define "navigable waters" as follows:

> The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by in state travelers for recreation or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shell are taken and sold in interstate commerce; and
>
> (6) Intrastate lakes, rivers, and streams which are utilized for indu trial purposes by industries in interstate commerce.

40 CFR §§125.1(p), 401.11(l). Based upon the information supplied your letter it appears that your pond is not now navigable waters.

As EPA's Region V advised you by letter of January 28, 1976, artifici ponds built for cooling and located on the property of the utility constitute a acceptable process technology for the control of heat. Whether the pond used for recreation is not relevant to its status as a "cooling pond," as define in 40 CFR §423.11 (m), with regard to the thermal effluent limitations an standards contained in the Steam Electric Power Generating Effluent Lim itation Guidelines and New Source Performance Standards (40 CFR 423, 39 *Fed. Reg.* 36186 *et seq.* Oct. 8, 1974).

Although as a result of *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), all of the thermal effluent limitations guidelines for the steam electric generating plant category have been remanded to EPA for further consideration and repromulgation, substantial portions of the chemical guideline limitations are still in effect. Chemical discharges into artificial water bodies which constitute navigable waters must comply with limitations on pollutants other than heat.

It is clear, therefore, that if the pond should be opened for use by interstate travelers for recreational (or other) purposes the pond would become navigable waters. Thereafter any introduction of pollutants into the pond would constitute a "discharge of pollutants" pursuant to Section 502(12) of the Federal Water Pollution Control Act, which would be subject to NPDES permit requirements under Section 402 of the Act. The only pertinent requirements under the effluent limitations guidelines would be those relating to chemicals. Other limitations might eventually be imposed under other regulating provisions, such as Sections 303 and 307 of the Act. Of course, if you limit use of the pond to Indiana residents only, then the pond would not be covered by our regulatory definition of "navigable waters."

It must be again pointed out that any change in the effluent limitation guidelines, either through further court action or on the Agency's initiative, could possibly alter the classification of the Gibson cooling pond for regulatory purposes.

If you feel that any further clarification is necessary or if there are any questions or comments, please do not hesitate to contact my office.

DETERMINATION OF JURISDICTION
UNDER CLEAN WATER ACT
(33 U.S.C. 1344)

MADRONA MARSH
Torrance, California

14 June 1982

Description

1. Madrona Marsh is located in the city of Torrance, California, approximately two and one half miles east of the Pacific Ocean and 15 miles southwest of the Los Angeles City Civic Center. The boundaries of the Marsh are Monterey Street on the north, Sepulveda Boulevard on the south, Maple Avenue on the east, and Madrona Avenue on the west. The Los Angeles District, Corps of Engineers, has identified nine areas of the Marsh as wetlands on the inclosed map. Area 1 is approximately 14 acres of wetland; areas 2 through 5 total approximately 1 acre; area 6 is approximately 1.2 acres; and areas 7 through 9 comprise approximately 2.7 acres of wetland.

2. Madrona Marsh was, historically, part of the South Torrance oil field, and oil production has continued to the present. A large oil pad with four oil pumps is located adjacent to wetland area No. 1. Several additional pumps are situated at other locations within the site on upland areas. A census of birds taken for the City of Torrance from April 1975 to May 1976 indicated a total of 98 bird species of which 28 species were restricted to the wetlands, 47 species used both wetland and adjacent upland, and 23 species were observed in the upland areas only. No endangered or threatened bird species have been reported, but a white-tailed kite (fully protected) was observed on several occasions during the fall and winter in both wetland and upland areas. Migratory waterfowl use the marsh for a wintering area and a temporary resting and feeding area during migration. These include Mallard, Pintail, Greenwinged Teal, Shoveler, Canvasback, and Ruddy Duck. Other migratory birds reported in the Marsh include the Green Heron, Snowy Egret, Least Bittern, Whimbrel, and Yellowlegs.

3. Madrona Marsh is a seasonal wetland with direct rainfall and a drainage area of approximately 200 acres as its sources of water. At present, most of the water is supplied through a ditch entering the Marsh at the northern end just south of Monterey Street. Another smaller drainage ditch enters from Maple Avenue. The Marsh has no underground water source from springs and is maintained as a wetland during the wet season

due to an impermeable clay soil layer which prevents percolation and, to a lesser extent, transpiration. The surface water which collects during the wet season is not connected with the ground water table, and the marsh has no outlet. As such, it is an isolated wetland.

History

4. A group known as the Friends of Madrona Marsh has been active and successful in having several hundred thousand dollars set aside in the State budget toward acquisition of the Marsh as a wildlife refuge. However, the amount budgeted falls far short of the amount needed to purchase the land. The Torrance Investment Company has proposed a large development project, including residential and office development, for the Marsh and its vicinity.

5. On 27 February 1980 the Los Angeles District Engineer determined that the approximately 18.9 acres described above are wetlands and are subject to the jurisdiction of the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. sec. 1344. On 13 April 1981 a petition for withdrawal of jurisdiction was filed in the Los Angeles District on behalf of the Pacific Legal Foundation and the Torrance Investment Company. Under the Memorandum of Understanding between the Corps of Engineers and the Environmental Protection Agency, 45 Fed. Reg. 45,018 (2 July 1980), the District Engineer asked the EPA whether it considered the case to be of "special interest" so that the EPA would make the determination of jurisdiction. EPA declined to make the determination.

6. On 14 August 1981 the District Engineer granted the petition for withdrawal of jurisdiction, concluding that "the mere presence and usage of the wetlands in Madrona Marsh by migratory waterfowl is not sufficient to make those wetlands 'part of a chain or connection to the production, movement, and/or use of interstate commerce'." Then, on 11 February 1982, in response to a petition from the Friends of Madrona Marsh under the Corps/EPA MOU, Brigadier General Forest T. Gay, III, Deputy Director of Civil Works, US Army Corps of Engineers, made the following determination:

> Based on the review of this matter by our Office of Chief Counsel, we have determined that a more adequate opportunity for public participation should have been made available before the Los Angeles District Engineer made his determination on the subject issue.

> Therefore, we are requesting our South Pacific Division Engineer to provide such an opportunity, following which he will independently evaluate the supplemented record before formulating his determination on the issue.

7. At my direction, the Los Angeles District Engineer issued a new public notice on 26 March 1982 and received 50 letters and cards in response. I have carefully reviewed these comments as well as the existing administrative record. The following is my independent evaluation and determination pursuant to the Deputy Director's request.

Issue: Jurisdiction

8. Section 404(a) of the Clean Water Act, 33 U.S.C. sec. 1344(a), requires a permit from the US Army Corps of Engineers for the discharge of dredged or fill material into the navigable waters. "Navigable waters" are defined in sec. 502(7) of the Act, 33 U.S.C. sec. 1362(7), as "the waters of the United States, including the territorial seas." The term "waters of the United States" is administratively defined in 33 C.F.R. sec. 323.2(a) to include four specific types of waterbodies, plus a fifth, general category:

> (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce [emphasis added].

9. The same Army regulation elaborates on the preceding definition in a footnote:

> In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)-(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the

> Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act.

10. The notion that the term "navigable waters" should be given the broadest possible constitutional interpretation comes directly from the legislative history, Conference Report, S. Rep. No. 1236, 92d Cong., 2d Sess. 144, reprinted in [1972] U.S. Code Cong. & Admin. News, p. 3822, and has been adopted by the courts in several cases, including Natural Resources Defense Council, Inc., v. Callaway, 392 F. Supp. 685, 686 (D. D.C. 1975); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); Jentgen v. United States, 657 F.2d 1210, 1211 (Ct. Cl. 1981); United States v. Holland, 373 F. Supp. 665, 671 (M.D. Fla. 1974); and United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

11. It is well-established, then, that the limits of jurisdiction under the Clean Water Act are as broad as the limits of the power of Congress under the interstate commerce clause of the Constitution, art. 1, sec. 8, cl. 3. The commerce clause has come to mean that Congress may regulate activiti ? which affect interstate commerce. Percy v. United States, 402 U.S. 146 (1971); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). In Wickard v. Fillburn, 317 U.S. 111 (1942), the Supreme Court stated:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' 317 U.S. at 125.

Furthermore, in a recent case involving a challenge to the Federal Surface Mining Control and Reclamation Act, the Supreme Court has stated:

> [E]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Hodel v. Virginia Surface Mining and Reclamation Assn., 101 S. Ct. 2352 (1981).

12. The issue to be determined at Madrona Marsh, then, is whether the degradation or destruction of its approximately 18.9 acres of wetlands would exert a substantial effect on interstate commerce.

Discussion: Jurdisdiction

13. The first effort by Congress to protect migratory birds, under the Migratory Bird Act of 1913 (37 Stat. 847), was invalidated by the courts. United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. M'Cullaugh, 221 F. 288 (D. Kan. 1915). When these cases were decided, the prevailing rule of law was that wildlife, including migratory birds, is the property of the various states. Geer v. Connecticut, 161 U.S. 519 (1896). However, Geer was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979), where the Supreme Court held that wild animals (minnows) should be treated like other commodities when they are shipped in commerce.

14. Hughes was presaged by a line of appeals court cases interpreting the Migratory Bird Treaty Act of 1918. 16 U.S.C. secs. 703-711. Provisions of that Act related to when and how migratory birds may be taken, killed, or possessed were passed by Congress under its treaty making power, so they do not necessarily represent an exercise of the commerce power. Missouri v. Holland, 252 U.S. 416 (1920). However, section 4 of the Act, 16 U.S.C. sec. 705, makes it unlawful to ship in interstate commerce any bird taken contrary to the laws of the state or province (of Canada) in which it was taken. This provision was upheld as a valid exercise of Congress' power under the interstate commerce clause in Bogle v. White, 61 F.2d 930 (5th Cir. 1932).

15. Shortly thereafter, regulations under the Act which prohibited the placing of corn near hunting blinds before the season opens in order to lure migratory birds near blinds so that they may be shot, were upheld in Cochrane v. United States, 92 F.2d 623 (7th Cir. 1937), cert. denied, 303 U.S. 636 (1938), and Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938). These cases specifically mentioned the commerce power as a basis for the baiting regulations. Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942), also upheld these regulations under the commerce power, emphasizing the character of hunting as interstate commerce.

16. A more recent case indicates that polluting even a small (10 acres) pond may be a violation of the Migratory Bird Treaty Act. In United States v. FMC Corporation, 572 F.2d 902 (2d Cir. 1978), the Corporation was convicted and fined for releasing a toxic chemical into its holding pond, thereby killing a number of migratory waterfowl. However, the conviction was based on section 2 of the Act (16 U.S.C. sec. 703), which prohibits the killing of migratory or insectivorous birds protected by the Treaty, and not on section 4 (16 U.S.C. sec. 705), which prohibits interstate shipment of any birds killed contrary to state law. Consequently, the case is a treaty power case and of little help in determining the limits of the commerce clause.

17. Another statute in which Congress moved to protect wildlife from acts which, at first blush, would appear to have only local effects, is the Airborne Hunting Act of 1971, 16 U.S.C. sec. 742 j-1. In United States v. Helsley, 615 F.2d 784 (9th Cir. 1979), the defendants were charged with shooting a coyote from an aircraft in violation of the Act. The court found the Act to be a valid exercise of the commerce power, but traced the authority to the Federal power to regulate airspace, which is "... as complete and as valid as the Federal power, to the extent it rests upon the commerce clause, to regulate navigable waters." 615 F.2d at 786. "In passing the Airborne Hunting Act," the court said, "Congress acted with an express purpose to regulate for the safety of the national air space."

18. The Federal power over airspace is all that is necessary to sustain the Airborne Hunting Act, according to the Helsley court, but it went further and commented in dictum:

> Even if we should find it appropriate to ascribe a dominant purpose to the statute and should further conclude that this purpose was to regulate game management (and we neither assert that authority here nor make

> the finding), nevertheless, congressional regulation is not thwarted by arguments that the incidental connection between commerce and the regulation is used merely as an expedient to justify the law. The power to regulate commerce is plenary, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), and once the power exists it is for Congress, not the courts, to choose the ends for which its exercise is appropriate. 615 F.2d at 787.

This suggests that Congress may regulate the use of the channels of interstate commerce in such a way as to manage and protect migratory birds, but it does not help in defining the geographical limits of those channels. Furthermore, Congress did not, in the Clean Water Act, explicitly attempt to manage or protect migratory birds. Rather, its stated purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251.

Findings: Jurisdiction

19. Besides the use of Madrona Marsh by migratory waterfowl for a wintering area and as a temporary resting and feeding area during migration, two other possible connections to interstate commerce have been raised in response to the District Engineer's public notice. First, there are active oil wells in and near the Marsh area. However, there is no evidence that destruction or degradation of the wetlands would have any significant effect on the operation of these wells. Second, a number of people have commented that interstate travellers frequently visit, study, and enjoy the Marsh. There is no evidence, though, that any of these travellers would alter their interstate travel were the Marsh destroyed or degraded. It seems clear from the public comments that visiting the Marsh is a secondary or even incidental purpose of the visitors' interstate travel. This is quite different from the large-scale, regional, water-related recreation activities which take place at the Indiana lake at issue in United States v. Byrd, above. I find that neither of these two possible connections to interstate commerce is sufficient to support Corps of Engineers jurisdiction under the Clean Water Act.

20. Thus, the pivotal issue for determining Corps of Engineers jurisdiction at Madrona Marsh is whether the destruction or degradation of the Marsh as a wintering area for migratory waterfowl and as a temporary resting and feeding area during their migration would have a substantial effect on interstate commerce.

21. A number of the interstate commerce cases discussed above involve hunting as the commercial activity. For example, Cerritos Gun Club v. Hall, above, involved a challenge to Federal regulations by hunters, who purchase a great deal of ammunition and equipment and who frequently travel in interstate commerce themselves in the pursuit of their sport. The destruction or degradation of the approximately 18.9 acres of wetland in the Madrona Marsh would certainly displace most or all of the game birds which winter or rest and feed there. It may even reduce the total populations of these game species very slightly. However, there is no evidence that any hunting takes places at Madrona Marsh, and I find that the impact of the Marsh on hunting regionally or nationally is insufficient to support Corps of Engineers jurisdiction under the Clean Water Act.

22. Other Clean Water Act cases have supported jurisdiction on the basis of the vital role which many wetlands play in the food chain, and their consequent impact on interstate commerce. For example, in Zabel v. Tabb, 430 F.2d 199, 203-4 (5th Cir. 1970), the court held that "the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce ... dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially." Yet, Madrona Marsh is very different from the Florida Gulf estuary at issue in Zabel v. Tabb. It does not serve the important functions of a nursery for commercial fisheries, an enhancer of water quality, or a storm buffer that coastal wetlands serve. While the degradation or destruction of Madrona Marsh would clearly be a loss to the surrounding area in many ways including ecologically, I find that, due to the small size and isolated character of the wetlands located there, such a loss would not have a substantial effect on interstate commerce.

Issue: Public Participation

23. The proposed development of the Madrona Marsh area has been a very controversial one in the city of Torrance and the surrounding area. Of the 50 comments received in response to the District Engineer's 26 March 1982 public notice, five implicitly or explicitly requested a public hearing on the issue. Also, the Deputy Director of Civil Works directed a more adequate opportunity for public participation.

Discussion: Public Participation

24. Normally, jurisdiction is a legal determination which does not involve public participation at the administrative level. It is presumed that Congress involved the public before it defined its jurisdiction in a statute. However, in this case, applying the statutory definition requires a finding of facts by the administrator, and it is appropriate to solicit information from the public in determining actual effects on interstate commerce. For this reason, the public notice solicited public comments.

25. The Corps of Engineers regulation which sets out a policy on public hearings applies, by its terms, only to the consideration of a permit application, not to a determination of jurisdiction. However, I have applied that policy to this issue as well. The policy states: "Requests for a public hearing under this paragraph shall be granted, unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." 33 C.F.R. sec. 327.4(b).

Finding: Public Participation

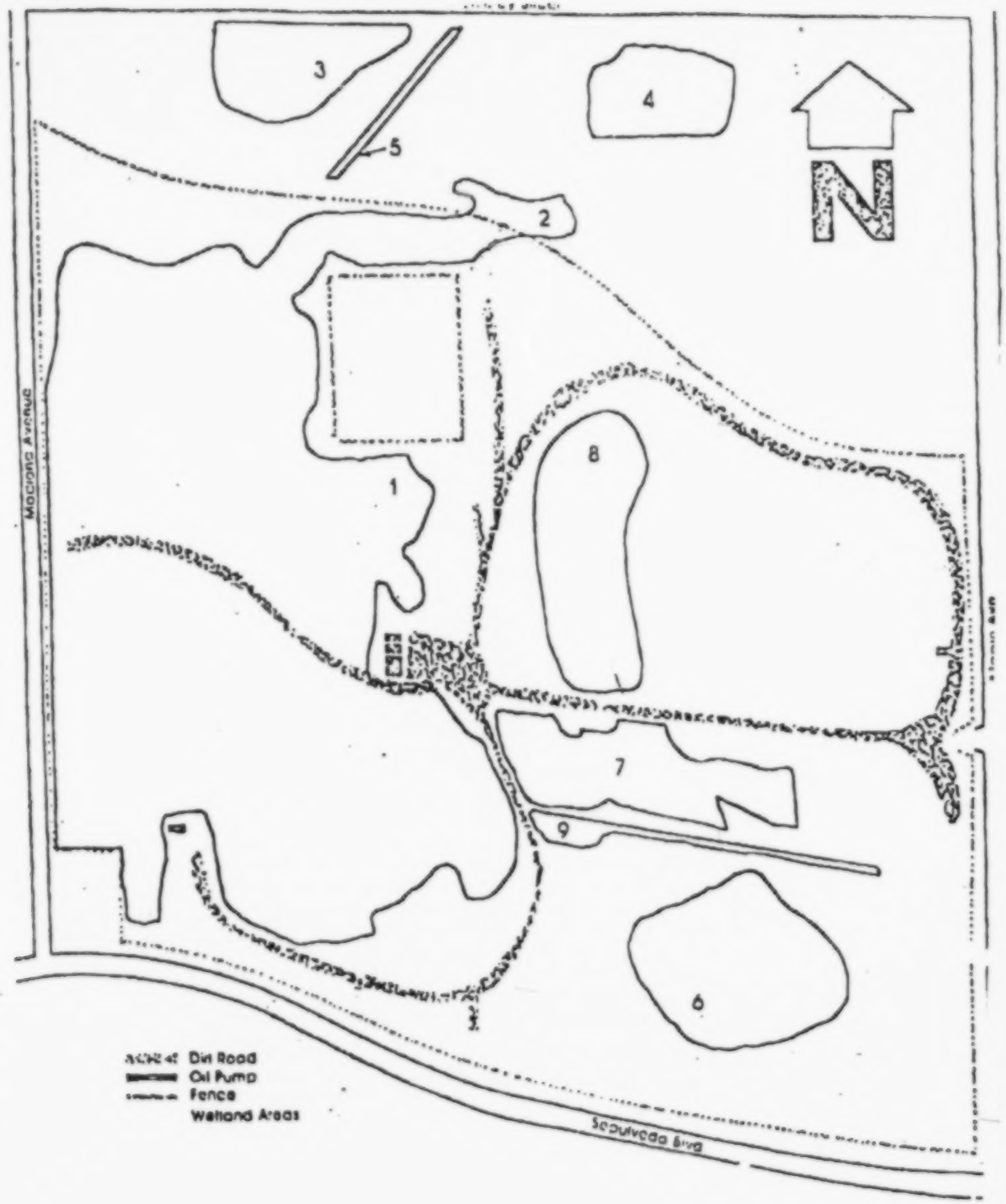
26. The District Engineer has determined that there is no valid interest to be served by a public hearing on this determination. The desirability of preserving the marsh as open space and as an educational area was repeatedly stressed in the written comments and at the public hearing held by the City of Torrance on the zoning of the area. But these indisputably important issues cannot be addressed by the Corps of Engineers unless it has jurisdiction over the area. They are more appropriately addressed by state and local governmental agencies, as they have, indeed, been addressed by the City in its zoning decision. The facts supporting my finding of no substantial effect on interstate commerce are adequately established in the written record, including the public comments, the Environmental Impact Report for the proposed development, and the Corps of Engineers' own biological investigations. Therefore, I find that a public hearing would serve no valid interest at this time and that the opportunity for public participation has been adequate.

Summary

27. I find that the US Army Corps of Engineers has no jurisdiction over the Madrona Marsh area under section 404 of the Clean Water Act because the destruction or degradation of the Marsh would not have a substantial effect on interstate commerce. Furthermore, I find that the opportunity for public participation in this decision has been adequate.

14 JUN 1982
Date

SIGNED
HOMER JOHNSTONE
HOMER JOHNSTONE
Brigadier General, USA
Division Engineer



July 5, 1983

MEMORANDUM

SUBJECT: Clean Water Act Jurisdiction Over Springs in Ash Meadows, Nevada

FROM: A. James Barnes
Acting General Counsel

TO: Frank Covington, Director
Water Management Division
Region 9

Pat Alberico has referred to this office your request for guidance on Clean Water Act (CWA) jurisdiction over isolated springs in Ash Meadows, Nevada. Based on our review of the background materials you provided and the applicable law, it appears that CWA jurisdiction exists over the springs in question.

Facts

Ash Meadows is an oasis area in the Mohave Desert in Nye County, Nevada, near the California border. Because of its geomorphology, this area contains approximately 20 seeps and springs (hereinafter referred to collectively as springs), which discharge a total of approximately 17,000 acre feet of water per year. These springs are fed by underground water. They do not flow beyond the borders of the Ash Meadows area. Those waters and their adjacent marshes are home to a number of endemic plants and animal species. Ash Meadows apparently has the highest density of endemic plants and animals of any locality in the United States. Four species have been listed as endangered species under the Endangered Species Act, and another 14 are candidates for listing. These species, both listed and unlisted, have been extensively studied by a large number of scientists, including many from States other than Nevada.[1] The Devil's Hole spring was declared a disjunct part of the Death Valley National Monument by President Truman in 1952. The Bureau of Land Management maintains public use facilities in the area for recreational visitors. At times in the

[1] By letter of November 8, 1982, the Fish and Wildlife Service provided a list of 50 scientists actively involved in research in Ash Meadows. More than half are from States other than Nevada.

past, water drawn from the springs has been used for agr ture, largely unsuccessfully due to the high mineral conten the water, limitations on available water quantity, and soils. Preferred Equities Corporation, the present owner (significant portion of the water rights for discharges from springs, intends to use the water for a new urban deve ment.

Discussion

Clean Water Act jurisdiction extends, in inland waters, to "waters of the United States" (§ 502(7) of the Act), which defined in the applicable regulations, 40 C.F.R. § 230.3(s).[2] nonnavigable, isolated, intrastate waters, the Ash Meac springs would fit the definition of waters of the United S only if their:

> use, degradation, or destruction . . . would affect or could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign comm
>
> or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

Wetlands adjacent to the springs would have the same juris tional status as the springs themselves.

Whether any particular isolated water, such as the Meadows springs, falls within the regulatory definition wil course, depend upon the facts of the situation. In the pre case, the record indicates that the springs in question have tracted a significant number of scientists from out of Stat study the unusual flora and fauna they support, including eral endangered species. If the springs are degraded or stroyed, they will no longer support the distinctive wild species that attract the scientists. Thus, the springs appea

[2] Identical definitions appear at 40 C.F.R. §§ 122.2 and 233.3, and 33 (§ 323.2(a). Despite some wording changes over the years, intrastate waters by interstate travelers for recreational or other purposes have been incl since the first regulation interpreting "waters of the United States" was p ulgated.

fit the class of waters of the United States described in § 230.3(s)(3)(i), that is, waters the use, destruction, or degradation of which could affect interstate commerce including such waters "which are or could be *used by interstate or foreign travelers for* recreational or *other purposes*." (Emphasis added.)

While there is no case law directly on point, such a finding has support in *United States* v. *Byrd*, 609 F.2d 1204 (7th Cir. 1978) and *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (D. Ha. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). The *Byrd* case held that the use of a 2,500-acre lake by out-of-State travelers for recreational purposes could serve as the basis for a finding of CWA jurisdiction.[3] In the *Palila* case, the District Court held that the Endangered Species Act was a proper exercise of the commerce power because, by protecting the natural habitat of endangered species, it "preserves the possibility of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species . . . ."

Given the unusual collection of species directly dependent on the Ash Meadows system of springs, and the intensive study of species and their habitat by a significant number of interstate scientists, and the Federal interest reflected by listing under the Endangered Species Act, an assertion of CWA jurisdiction over the Ash Meadows springs is consistent with the applicable case law interpreting the Commerce Clause, the applicable CWA regulations, and the general purpose of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters (§ 101(a)). Since Congress intended that CWA jurisdiction extend to the maximum

[3] The opinion does not indicate the number of travelers involved.

extent permissible under the Commerce Clause,[4] it follows that there is jurisdiction over the springs in question.[5]

[4] Conference report, 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 327. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D. D.C. 1975); *Puerto Rico v. Alexander*, 438 F. Supp. 90, 95 (D. D.C. 1977); *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977).

[5] While not all the springs in question actually contain listed endangered species, the evidence suggests that the springs are so related that significant alterations to the springs that do not support such species may have an effect on those that do. In addition, the file indicates that the attraction for scientists is not merely the endangered species, but the whole system of endemic species dependent on the collection of springs. Therefore, I consider it appropriate to assert jurisdiction over the collection of springs, not just the specific springs that contain endangered species. Of course, discharges into those springs that do not contain endangered species are probably covered by the Corps of Engineers' nationwide permit for isolated waters, 33 C.F.R. § 330.4. The Corps should be consulted on questions concerning the scope of that permit, and the applicability of its conditions.

EXHIBIT 16

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 12 1985

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Richard E. Sanderson
Acting Assistant Administrator
Office of External Affairs (A-100EA)

FROM: Francis S. Blake
General Counsel (LE-130)

SUBJECT: Clean Water Act Jurisdiction over Isolated Waters

At the section 404 oversight hearings before the Senate Committee on Environment and Public Works on July 15, 1985, Senator Mitchell asked that you confer with the Office of General Counsel concerning a jurisdictional question under the Clean Water Act. Specifically, he asked whether, in asserting jurisdiction over isolated waters on the basis of use by migratory birds or endangered species, EPA required proof that a particular water body was actually used by such birds or endangered species prior to recognizing jurisdiction or whether EPA would be satisfied with evidence that such water body could be so used.

The jurisdiction of the Clean Water Act extends to "waters of the United States." EPA's regulations define waters of the United States to include, inter alia:

> (c) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>
> (1) Which are or could be used by foreign or interstate travelers for recreation or other purposes;
>
> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce.

40 CFR §122.2; 40 CFR §233.3.

These regulations implement the Congressional intent that Clean Water Act jurisdiction be asserted to the maximum extent permitted under the Commerce Clause. See, e.g., 1 Leg. Hist., at 178 and 250-51; Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983); Leslie Salt Co. v. Froelke, 578 F.2d 742 (9th Cir. 1978). Therefore, the regulations should be broadly construed, subject of course to the limitations of the Commerce Clause and the actual language of the regulations.

The specific definition of waters of the United States in EPA's regulations has evolved over the years, and it is not necessary to trace here its entire history since passage of the Act in 1972. However, it is relevant to note that in 1979 the agency changed the prior definition, which simply referred to waters used by, inter alia, industry in interstate commerce, to add the phrase "waters the use, degradation, or destruction of which would affect or could affect" commerce.1/ As explained in the preamble, this language was intended to broaden the definition of waters of the United States based on the susceptibility of a stream of use by industries in interstate commerce (44 Fed. Reg. 32854, June 7, 1979).

> [T]he regulations now focus, not on the nature of the stream's users, but on the characteristics of the stream itself, and it will no longer be necessary to show actual industrial use for a stream to fall within the definition.

Id. at 32858.2/

It is now generally accepted that migratory birds and endangered species may be regulated under the Commerce Clause, and that this regulation extends to protection of habitat. See, e.g., Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984); Hughes v. Oklahoma, 441 U.S. 322 (1979); Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Ha. 1979), aff'd 639 F.2d 495 (9th Cir. 1981). The impact on commerce of the destruction of any one isolated wetland need not itself be

---

1/ This change was made after an Office of General Counsel opinion interpreted the old definition as not covering intrastate waters at or below a discharge point where there was no actual use by a downstream industrial user. Decision of the General Counsel No. 73 (Dec. 15, 1978).

2/ In addition, the regulation was reworded to make explicit the long-held view that the waters specifically mentioned were not an exclusive list of waters of the United States.

significant; Congress has the authority to regulate activities which cumulatively could have a significant effect even if a particular individual activity would not. Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942); U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).

With this background, I now turn to the specific question at hand. In simplified terms, the answer is that if the evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species, it is covered by EPA's regulation. Of course, as the preamble to the 1979 regulation points out, the clearest evidence would be evidence showing actual use in at least a portion of the stream. In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).

Endangered species are, almost by definition, rare. Therefore, in the case of an endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, presumably one would usually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. Again, a specific determination of jurisdiction would turn on the particular facts.

EXHIBIT 17

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 17 1985

OFFICE OF
EXTERNAL AFFAIRS

Honorable George J. Mitchell
United States Senate
Washington, D. C. 20510

Dear Senator Mitchell:

Please find enclosed an EPA Memorandum prepared by our General Counsel in response to your request for information regarding the establishment of jurisdiction over isolated waters on the basis of use by migratory birds or endangered species. As the memorandum states, if evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species, it is covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the stream. In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used).

Endangered species are, almost by definition, rare. Therefore, in the case of an endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, presumably one would usually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. Again, a specific determination of jurisdiction would turn on the particular facts.

I would add that this has been the consistent interpretation of the Agency since 1979. I hope this information will be helpful to you and the other Subcommittee members. If there is any further information EPA can furnish, please do not hesitate to contact me.

Thank you for your continued interest in and support of the work of this Agency.

Sincerely,

Richard E. Sanderson
Acting Assistant Administrator
External Affairs

Enclosure

EXHIBIT 18

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

20 SEP 1985

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Guidance to FOA's on Isolated Wetlands

During the recent Senate oversight hearings on the Section 404 program, questions have been raised about the limits of jurisdiction. Specifically, Senator Mitchell requested specific guidance be provided to the FOA's on the nexus to interstate commerce in isolated wetlands.

As a result of these concerns, EPA council prepared the enclosed memorandum. I concur with the position in this memo. Please distribute this to all FOA's as soon as possible.

Also, please provide me a copy of your transmittal to the FOA's so that I can forward it to the Senate Subcommittee on Environmental Pollution.

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Enclosure

EXHIBIT 19

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

11 OCT 1985

Honorable George J. Mitchell
United States Senate
Washington, D. C. 20510

Dear Senator Mitchell:

This is in response to your request for a review by my office of the jurisdictional determination made by Galveston District on "Pond 12." We do not intend, and I do not believe you requested us, to perform a legal or formal review, but rather a general overview as discussed on September 18, and during previous oversight hearings. Let me say at the outset, as I have during the oversight hearings, that this Administration has not changed, in any way, policy on determining the limit of Section 404 jurisdiction.

Pond 12 is a 30-acre pond on agricultural land located approximately 60 miles from the Mexican border. This is a type of pond which the Galveston District believes does not and could not support use by migratory birds, or endangered species the alternation or elimination of which could affect interstate commerce. Furthermore, the District determined that Pond 12 still could not support such use when considered cumulatively with potential impacts on other areas including those sharing its characteristics. Therefore, the District did not exert regulatory jurisdiction under Section 404. The Galveston District assures me that they do exert jurisdiction over many isolated waters that support use or could support use by migratory birds or endangered species the alteration or elimination of which would affect interstate commerce.

This jurisdictional determination is consistent with our regulations and the September 12, 1985, EPA legal memorandum. The Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations. The "could be used" criterion has been an integral part of our regulations since 1977 (i.e. "the degradation or destruction of which could affect interstate

commerce"; 33 CFR 323.2(a)(5), 42 Federal Register 138 page 37144). The Corps has traditionally taken a reasonable approach to what constitutes an affect on interstate commerce. This, I believe, is what Mr. Sanderson referred to at the July 15, 1985, oversight hearing, when he said the "rule of reason" should be applied to interstate commerce calls. Finally, when Galveston District made the jurisdictional determination on Pond 12 they were applying the cumulative impact test noted in EPA's September 12, 1985, legal memorandum. That is, the pond is not considered to have the "characteristics" of a water the individual or cumulative use degradation or destruction of which could affect interstate commerce.

Unfortunately, the Galveston District used terminology in their letter to the U.S. Fish and Wildlife Service that described the use by migratory birds and endangered species as "limited" and not "substantial." In fact, I am informed that the occurrence of migratory birds and endangered species was so trivial, that the District did not believe there was an effect on interstate commerce.

Nothing has come to my attention indicating any instances of contravention of laws, regulations, or guidance on this specific jurisdictional determination. Let me reiterate that this Administration has done absolutely nothing to change, in any way, the limit of Section 404 jurisdiction of the Clean Water Act.

Sincerely,

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

EXHIBIT 20

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

October 25, 1985

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Robert K. Dawson
Acting Assistant Secretary of
the Army (Civil Works)
2E570 Pentagon
Washington, DC 20310

Re: Notice of Violation of Section 404, Clean Water Act (Commerce Clause Jurisdiction)

Dear Mr. Dawson:

The purpose of this letter is to provide written notice of the alleged violation by the Corps of Engineers of Sections 301(a) and 404 of the Clean Water Act, as amended, 33 USC 1311(a) and 1344. This notice is provided pursuant to Section 505(a) and (b) of the Act, 33 USC 1365(a) and (b).

The Corps has violated Sections 301(a) and 404 by refusing to require permits for the discharge of dredged or fill material in certain so-called "isolated" waters. The ostensible ground cited by the Corps for this refusal is that the discharge activity supposedly will not have an effect on interstate or foreign commerce. In at least one instance the District Engineer, Galveston District, has refused to assert regulatory authority over an isolated waterbody and adjacent wetlands located in Willacy County, Texas, and commonly referred to as Pond No. 12, allegedly because of insufficient jurisdiction under the Commerce Clause (see enclosed copy of September 4, 1985 letter).

The Corps' improperly restrictive interpretation of its constitutional power pursuant to the Clean Water Act is a violation of the Corps' regulations and of the Act itself. The Corps' refusal to regulate destruction of wetlands that are subject to the Clean Water Act also is a violation of the Corps' regulations and the Act.

You may consider this letter to constitute notice for each and every other instance in which the Corps refuses to exercise

its regulatory authority over isolated wetlands for the reasons stated in the September 4, 1985 letter or for related reasons.

Jerry Jackson is the staff attorney representing the National Wildlife Federation on this matter. He can be reached at (202) 797-6827.

Sincerely,

Lynn A. Greenwalt
Vice President
Resources Conservation Department

Enc.
c: Lee M. Thomas, Administrator, USEPA
Dick Whittington, Region VI Administrator, USEPA
Edwin Meese III, U.S. Attorney General
Delta Irrigation District, Edcouch, TX
Alan Allen, Sportsmen's Clubs of Texas, Inc.

EXHIBIT 21

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

8 Nov 85

REPLY TO ATTENTION OF:

DAEN-CWO-N

SUBJECT: EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters

SEE DISTRIBUTION

1. Enclosed is an EPA legal memorandum dated 12 September 1985. This memo is being forwarded pursuant to a commitment made by Mr. Dawson to the Senate Committee on Environment and Public Works, Subcommittee on Environmental Pollution.

2. This legal memorandum was prepared by EPA in response to a specific question on interstate commerce asked by Senator Mitchell during Senate oversight hearings on the Section 404 program.

3. The specific question the memorandum addresses arose during the dialogue at the hearing between Senator Mitchell and Mr. Richard Sanderson, Deputy Assistant Administrator for External Affairs. Senator Mitchell asked the question after Mr. Sanderson listed the following seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands:

"1. Waters from which fish or shellfish are or could be taken and sold [in] interstate or foreign commerce;

2. Waters which are or could be used by interstate or foreign travelers for recreational or other purposes;

3. Waters which are or could be used for industrial purposes by industries [in] interstate commerce;

4. Waters used as habitat by birds protected by Migratory Bird Treaties;

5. Waters used as habitat by other migratory birds which cross State lines;

6. Waters which are habitat for endangered species; and

7. Waters used to irrigate crops sold in [interstate] commerce."

DAEN-CWO-N
SUBJECT: EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters

4. Senator Mitchell was confused by Mr. Sanderson's failure to include the words "could be used" in points 4, 5, and 6 dealing with migratory birds and endangered species. After discussion, Senator Mitchell finally stated, "So I think a more proper phraseology here would be to insert in items 4 and 5 after the word "water," the same words which appear in the first three categories, "waters which are or could be used."

5. Mr. Sanderson responded, "I think that is a legitimate interpretation. If I may, I would like to confer with my counsel before I do it, but I will get back to you for the record."

6. The legal memorandum represents EPA's position on the specific point that "are used or could be used" is the appropriate language. This is consistent with our regulations at 33 CFR 323.2(a)(3) and, therefore, should not be viewed as a change in policy.

7. At the hearing, Mr. Dawson also agreed to work with EPA and Interior to develop a national policy statement on the connection to interstate commerce for determinations of Section 404 jurisdiction in isolated waters. Discussions on this policy are still in an early phase.

FOR THE COMMANDER:

Encl

PATRICK J. KELLY
Brigadier General, USA
Deputy Director of Civil Works

DISTRIBUTION:
(See page 3)

EXHIBIT 22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF
EXTERNAL AFFAIRS

Mr. Robert K. Dawson
Acting Assistant Secretary
of the Army (Civil Works)
Department of the Army
Pentagon
Washington, D.C. 20310-0103

Dear Bob:

Thank you for sending me a copy of your October 11, 1985 letter to Senator Mitchell concerning Clean Water Act jurisdiction over an isolated water in Texas known as Pond 12. I am not personally familiar with the facts of Pond 12 and am therefore not in a position to question the Galveston District's jurisdictional determination in that case. However, I believe that your letter, if circulated to the field as guidance, could possibly be interpreted inconsistently with EPA's legal memorandum of September 12, 1985. We have both assured Senator Mitchell that EPA's legal memorandum represents the Administration's position on the question it addressed.

The phrase in the Pond 12 letter which could possibly lead to misunderstanding is "use by migratory birds or endangered species the alteration or elimination of which could affect interstate commerce" (emphasis added). While our regulation speaks of isolated waters the use, destruction, or degradation of which could affect interstate commerce, that requirement can be satisfied by showing that a particular waterbody is or could be used by migratory birds or endangered species. The phrase in the Pond 12 letter could be misconstrued as requiring a two-step process for establishing jurisdiction based on migratory birds and endangered species: first a determination that a particular waterbody is or could be expected to be used by migratory birds or endangered species, and then an additional determination of the effect on interstate commerce through the alteration or elimination of such a water (alone or in conjunction with the loss of other waters with the same characteristics).

Such a reading would, of course, be inconsistent with our legal memorandum. That memorandum notes that migratory birds and endangered species may be regulated under the commerce clause. It further notes that the impact on commerce of the destruction of any one isolated wetland need not itself be significant. Thus, since migratory birds and their habitat are properly regulated under the Commerce clause, establishing that a particular water is part of that habitat (through the "is or could be used" test in our memorandum) meets the requirements for Clean Water Act jurisdiction and no further showing is required.

Of course, a two-step process might be appropriate if one were dealing with a use other than migratory birds or endangered species or the specific examples in section 122.2(c)(1)-(3) of our regulations. However, since your Pond 12 memorandum specifically relates to migratory birds and endangered species, any reference to a two step process in that setting would be confusing. I am sure you will do whatever is needed to ensure that there is no misunderstanding on this point.

Sincerely,

Richard E. Sanderson
Deputy Assistant Administrator
for External Affairs

EXHIBIT 23

DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT, CORPS OF ENGINEERS
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO ATTENTION OF

Regulatory Division
Field Monitoring Branch

MAR 12 1986

PUBLIC NOTICE

TO WHOM IT MAY CONCERN: The purpose of this notice is to advise the public about a recent EPA legal memorandum on Clean Water Act jurisdiction over isolated waters and wetlands.

The legal memorandum was prepared by EPA in reponse to a specific question on interstate commerce during Senate oversight hearings on the Section 404 program. A copy of the EPA legal memorandum is available from the U.S. Army Engineer District, Jacksonville, Post Office Box 4970, Jacksonville, Florida 32232-0019, ATTN: Field Monitoring Branch, upon written request.

The specific question the memorandum addresses is the use of migratory birds as a nexus for interstate commerce. The legal memorandum clarified that the phrase "are or could be used" is the appropriate language.

In view of the above, virtually all isolated waters and wetlands have been provided with an interstate commerce connection and therefore those waters and wetlands are subject to Section 404 jurisdiction. Accordingly, prior to discharging any dredge or fill material into these areas, a Department of the Army permit will be required.

Anyone planning to discharge dredge or fill material into a water of the United States including wetland areas is encouraged to check with the applicable Area/Field Office shown on the attached map regarding the need for a Department of the Army permit in view of the EPA legal memorandum's impact on Section 404 jurisdiction.

Any questions regarding the above should be directed to Ronald H. Silver at (904) 791-1679.

FOR THE COMMANDER:

JOHN F. ADAMS
Chief, Regulatory Division

RECEIVED
MAR 14 1986
CITY PANAMA CITY

EXHIBIT 24

28 MAY 1986

Mr. John Meagher
Aquatic Resource Division
Office of External Affairs
Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Meaghar:

Enclosed is a draft Regulatory Guidance Letter (RGL) on isolated waters that we are proposing to send to our field offices. The RGL builds upon the guidance provided in your legal memorandum of September 12, 1985, adding additional clarification to the concepts of a true "waterbody", and "use" by migratory birds and endangered species. In addition, we have developed a list of waters which generally will not be considered waters of the United States.

Please review the draft RGL and call us to set up a convenient time when we can meet to discuss its contents. We also have sent a copy of the RGL to the Department of Justice and will ask that they participate in subsequent meetings.

Sincerely,

C. G. Goad
Chief, Operations and Readiness Division
Directorate of Civil Works

Enclosure

[illegible] Clean Water Act Jurisdiction [illegible]

1. By letter dated 3 November 1986, we forwarded to you an Environmental Protection Agency (EPA) legal memorandum dated 12 September 1986, which listed seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands. This Regulatory Guidance Letter (RGL) has been developed in consultation with the EPA and further clarifies the use of those factors in making jurisdictional determinations.

2. Initially, it is important to establish that an area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to exclude automatically isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subjected, and weather or hydrologic records. Remember that geographic jurisdiction under the Clean Water Act is dynamic and can be affected by natural, permitted or unregulated hydraulic modification and other changes in water regime.

[illegible] isolated [illegible]

portions of EPA's memorandum concerning [illegible] that be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effect on commerce must emanate from use of the water in place. The general principle is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." On the other hand, if the waterbody is of a type which is so lacking in genuine habitat value that one would expect no more than occasional or accidental use by migratory birds, that waterbody would not be a "water of the United States."

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always possible to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those characteristics make it likely that the waterbody in question will be used by migratory birds.

[illegible] to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, one should conclude that the waterbody is not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody.

6. Neither the process of excavating material from dry land nor the placement of fill into any waterbody shall in and of itself be considered an interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the subsequent use of the fill, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. An interstate commerce connection must be based on the use of the waterbody itself prior to the commencement of an activity subject to Corps regulatory authority.

7. As a general rule the following areas are not considered waters of the United States:

a. Artificial reflecting or swimming pools or other ornamental bodies of water created by excavating and/or diking dry land to retain water for recreational or aesthetic reasons;

b. Artificial lakes or ponds [illegible] land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling treatment, rice growing or aquaculture; and

c. Water filled depressions created incidental to construction activity, and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the operation is abandoned and the resulting body of water becomes "naturalized" and then satisfies one of the seven factors enunciated by EPA.

8. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

PATRICK J. ELLY
Brigadier General
Deputy Director of Civil Works

[EPA letterhead]

SUBJECT: Clean Water Act Jurisdiction Over Isolated Waters

1. By letter dated 8 November 1985, we forwarded to you an Environmental Protection Agency (EPA) legal memorandum dated 12 September 1985, which listed seven factors as indicators of connections to interstate commerce to determine jurisdiction in isolated waters and wetlands. This Regulatory Guidance Letter (RGL) has been developed in consultation with the EPA and further clarifies the use of those factors in making jurisdictional determinations.

2. Initially, it is important to establish that an area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to exclude automatically isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subjected, and weather or hydrological records. Remember that geographic jurisdiction under the Clean Water Act is dynamic and can be affected by natural, permitted or unregulated hydraulic modification and other changes [illegible] regime.

3. Once an isolated area has been verified as a true waterbody, then those portions of EPA's memorandum concerning migratory birds and endangered species must be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effect on commerce must emanate from use of the water in place. The general principle is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." One the other hand, if the waterbody is of a type which is so lacking in genuine habitat value that one would expect no more than occasional or accidental use by migratory birds, that waterbody would not be a "water of the United States."

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always possible to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those shared characteristics make it likely that the waterbody in question will be used by migratory birds. Conversely, the waterbody would likely fail the criteria when information exists that the particular waterbody is not used, and the characteristics are not conductive to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the areas by the species in question, one should conclude that the waterbody is not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody.

[Appears to be mis-numbered in original.]

6. Neither the process of excavating material from dry land nor the placement of fill into any waterbody shall in and of itself be considered an interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the subsequent use of the fill, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. An interstate commerce connection must be based on the use of the waterbody itself prior to the commencement of an activity subject to Corps regulatory authority.

7. As a general rule the following areas are not considered waters of the United States:
Artificial reflecting or swimming pools or other ornamental bodies of water created by excavating and/or diking dry land to retain water recreational or aesthetic reasons;
Artificial lakes or ponds [illegible] land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling treatment, rice growing or aquaculture; and
Water filled depressions created incidental to construction activity, and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the operation is abandoned and the resulting body of water becomes "naturalized" and then satisfies one of the seven factors enunciated by EPA.

8. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

PATRICK J. ELLY
Brigadier General
Deputy Director of Civil Works

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 28 1987

OFFICE OF WATER

Mr. John P. Elmore
Chief, Operations and Readiness Division
Directorate of Civil Works
Office of the Chief of Engineers
Washington, D.C. 20314-1000

Dear Mr. Elmore:

Thank you for the opportunity to review your draft Regulatory Guidance Letter (RGL) on Section 404 jurisdiction over isolated waters. Our comments are marked on the enclosed copy of the draft RGL.

In addition to our specific comments, I would like to point out that Paragraph 3 of the draft RGL states as a general principle that "an isolated water body is a "water of the United States" if the evidence shows that it is used or would be used by migratory birds or endangered species in the ordinary course of events." It should be clarified that other commerce clause connections may exist, for example non-avian wildlife with ranges likely to cross State lines, fish harvests that go into interstate commerce, and visits by out-of-State scientists, recreationists, etc. It may be useful to cite the examples used in your regulations (33 CFR §328.3(a)(3)) and preamble (51 Federal Register 41217), although again it should be made clear that these are only examples and not all-inclusive.

In view of EPA's lead responsibility in the area of Clean Water Act jurisdiction, I would like to propose that we prepare and issue this document as joint guidance, as we did with the recent guidance on drainage ditch maintenance under Section 404(f)(1)(C), rather than as a Corps RGL. If you would prefer to issue this as a RGL, we request that you provide us an opportunity to concur on the RGL prior to issuance, after which we would issue identical guidance to our Regions. We believe that joint or parallel issuance would be a step toward clearer and more consistent determinations of Clean Water Act jurisdiction.

We commend the Corps for taking the initiative in developing this guidance. Please contact Suzanne Schwartz of my staff at 382-5043 if you wish to discuss our comments.

Sincerely,

David G. Davis, Director
Office of Wetlands Protection

Enclosure

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO ATTENTION OF:

CECW-OR

Mr. David G. Davis
Director, Office of Wetlands
Protection
Environmental Protection Agency
401 M Street, SW.
Washington, D. C. 20460

Dear Mr. Davis:

Enclosed is a final version of the regulatory guidance on isolated waters that you reviewed and returned to us by letter dated August 28, 1987. We have adopted all of your suggested changes with two exceptions:

a. We have retained the two sentences in paragraph 3 dealing with the comparison of ephemeral areas and seasonally dry streams which we believe are important concepts; and

b. Restatement of the Preamble language for 33 CFR 328.3(a) (at paragraph 5 of your revisions) is not necessary since that language was derived from the draft regulatory guidance letter (RGL) and has preempted it.

Regarding the comment in the second paragraph of your letter concerning "the general principle" in paragraph 3 of the draft RGL, we have changed the phrase to read "a general principle." We do not believe it is necessary to relist other commerce clause connections since: they are usually much more clear-cut; it is very unlikely that there is any waterbody in the United States that would have one of these other connections and not some type of migratory bird usage; and these other connections are seldom brought into question by the field.

I hope that this revision will be satisfactory and that we can provide this much needed guidance to the field as quickly as possible. Should you have any questions concerning this matter, my staff contact is Robert Pierce (272-1786).

Sincerely,

Peter J. Offringa
Brigadier General, U. S. Army
Deputy Director of Civil Works

Enclosure

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314-1000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Clean Water Act Jurisdiction Over Isolated Waters

1. This guidance has been developed jointly between the Corps of Engineers and the Environmental Protection Agency (EPA) and further clarifies jurisdiction over isolated waters.

2. Initially, before reaching the commerce connection issue, it is important to establish that an isolated area truly is a waterbody. Water in an isolated depression normally must be sufficiently persistent to exhibit an ordinary high water mark or the presence of wetland characteristics before it can be considered as a waterbody potentially subject to Clean Water Act jurisdiction. This is not intended to automatically exclude isolated areas which, due to climatic factors, are characterized as seasonal wetlands. Evidence concerning the persistence of an area's wetness can be obtained from its history, vegetation, soil, drainage characteristics, uses to which it has been subject, and weather or hydrologic records.

3. Once an isolated area has been verified as a true waterbody, then those portions of EPA's memorandum concerning migratory birds and endangered species must be applied in a reasonable manner. Isolated, ephemeral areas of water do not affect commerce as do seasonally dry stream tributaries that are waters of the United States from which pollutants may be washed into receiving waters and across state lines. Instead, an isolated water's effects on commerce must emanate from use of the water in place. A general principle stated in EPA's memorandum is that an isolated waterbody is a "water of the United States" if the evidence shows that it is used or could be used by migratory birds or endangered species in the ordinary course of events. One should consider whether the characteristics of the waterbody would lead one to expect it to be used as habitat for at least part of the life cycle of migratory birds or endangered species. For example, if one would expect the waterbody to be used with some degree of regularity as a resting or feeding area for birds during migration, that waterbody would be a "water of the United States." On the other hand, if the waterbody is so lacking in habitat value that use by migratory birds has not been observed and would not be reasonably expected, then this factor would not be the basis for asserting jurisdiction over that waterbody.

a. The best determination would be made through a showing of "actual use" by migratory birds in at least a portion of the waterbody. However, it is not always practicable to show actual use. Therefore, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established, those shared characteristics make it likely that the waterbody in question would be used by migratory birds.. Conversely, the waterbody would likely fail the criteria when information exists that the particular waterbody is not used, and the characteristics are not conducive to use by migratory birds.

b. Regarding endangered species, if there is no evidence of actual use of the waterbody or similar waters in the area by the species in question, one may ordinarily assume that the waterbody is not susceptible to use by such species, unless there is clear evidence of potential use of the waterbody by the species.

4. An interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. Neither the process of excavating material from dry land nor the placement of fill into the waterbody shall in and of itself be considered the requisite interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the source of fuel used during the operation or the business connections of the individual owning, managing or conducting the operation. Where an isolated waterbody does not otherwise have an interstate commerce connection, the fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody. However, once the fill is in place, interstate commerce activities which do take place as a result of the fill, establish an interstate commerce connection for the unfilled portion of the waterbody.

Peter J. Offringa
Brigadier General, U. S. Army
Deputy Director of Civil Works

David G. Davis
Director
Office of Wetlands Protection

EXHIBIT 25

United States
Environmental Protection
Agency

Region 10
1200 Sixth Avenue
Seattle WA 98101

Alaska
Idaho
Oregon
Washington

EPA

SEP 08 1989

Reply To
Attn Of: WD-138

Burt Paynter, Chief
Regulatory Branch
Portland District, Corps of Engineers
Post Office Box 2946
Portland, Oregon 97208-2946

RE: June 13, 1989, Letter to Vivian M. Brown (071-0YA-4--008496)
March 3, 1989, Letter to Stan Geiger

Dear Mr. ~~Paynter:~~ Burt

I was recently provided copies of two letters issued by your office regarding Section 404 jurisdiction. The referenced letters deal with jurisdictional questions on isolated and agricultural wetlands, respectively. The guidance and decisions which your office provided in these letters differ significantly from EPA's position and from the guidance provided in the new Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989). I would like to present our interpretation of the jurisdictional status of the sites addressed in the referenced letters. Your views on our interpretation would be appreciated.

The June 13, 1989, letter to Vivian M. Brown concludes that the isolated wetland in question is not a water of the United States. This determination is based on a finding that the wetland "is not used by and is not susceptible to use by migratory waterfowl." We disagree with this finding for several reasons. First, the basis for the finding is an apparent lack of open water, which is considered preferred habitat for waterfowl. In a Memorandum for the Record (MFR) dated June 7, 1989, by Robert Rose, personal communication is cited (John Marshall, Oregon Division of State Lands) indicating he had seen water three feet deep at the site. Even if this was not the case, waterfowl use of emergent marsh is not limited to open water.

Regardless, the commerce nexus at issue is not whether a site is used by migratory waterfowl but by migratory birds. In the same MFR, Mr. Rose indicates that the wetland area is used by sandpipers, which are migratory birds. However, a notation on the MFR dated June 9, 1989, cites the Tabb Lakes decision as a basis for dismissing use by "other migratory birds."

The Tabb Lake decision does not refute the migratory birds commerce nexus. Its decision was quite narrow, pertaining only to the Tabb Lake case

Above all, I would like to encourage a continuing dialogue among our two offices, our Portland Office, and the Oregon Division of State Lands regarding jurisdictional matters. It is extremely important that we present to the regulated public a consistent approach on jurisdiction and a common interpretation of the new jurisdictional method. Toward this end, we would appreciate being consulted on jurisdictional calls similar to those that are the subject of this letter prior to making a final determination.

Sincerely,

William M. Riley, Chief
Water Resources Assessment Section

cc: Dov Weitman, Office of General Counsel
Cliff Rader, OWP
ODSL

EXHIBIT 26

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

24 JAN 1990

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

DISTRIBUTION:
(See pg. 2)

United States Environmental Protection Agency

United States Department of the Army

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes* v. *United States*

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes* v. *United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes*, and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes*, which was limited to the procedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters "...prairie potholes, wet meadows, [and] playa lakes...", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated

waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

JOHN P. ELMORE — Date 1/24/90
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental Protection Agency:

DAVID G. DAVIS — Date 1-19-90
Director
Office of Wetlands Protection

EXHIBIT 27

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

[illegible] 01 FEB 1990

Operations, Construction
and Readiness Division
Regulatory Branch

Honorable Owen Pickett
House of Representatives
Washington, D C. 20515

Dear Mr. Pickett:

This is in response to your letter of January 11, 1990, requesting clarification of the U.S. Army Corps of Engineers wetland delineation policy and interpretation of the term "saturation to the surface".

You are correct that an area may be considered "saturated to the surface" even though "the top plane of the soil" is dry. The 1987 Corps of Engineers Wetlands Delineation Manual states clearly that the observations for indicators of saturation to the surface are made within a "major portion of the root zone of the prevalent vegetation". The entire root zone, which is usually within 12 inches of the surface, is the area inspected for evidence of wetland hydrology. The presence of field indicators results from anaerobic conditions (i.e., lack of oxygen) in the upper part of the soil profile. It has been the assumption of both the Corps and the Environmental Protection Agency, based on the technical literature of wetland scientists, and provided for in the various wetland delineation manuals, that capillary fringe allows the upper part of the soil to become saturated above the actual water table. The degree of saturation varies with the texture and structure of the soil, among other factors. Furthermore, where the Corps determines that areas are saturated in the root zone to the extent we identify them as wetlands, the top plane of the soil is saturated, at least briefly during rain events. The top plane of the soil dries quickly because of exposure to the air. However, even where the top plane is dry the saturation in the root zone has a controlling influence on the soil and vegetation.

It is also important to understand that wetland hydrology sufficient to meet the requirements of the 1987 Corps of Engineers Wetlands Delineation Manual, must be present at some time during the growing season. Many wetlands which are inundated during the growing season may be dry at the top plane

of the soil" during the non-growing season. Some saturated systems are virtually never visibly wet at any time at "the top plane of the soil", however, the root zone of the soil is saturated during the growing season, as reflected in the soil profile.

The reliance on the presence of field indicators is the methodology utilized by the Corps nationwide, due to both its technical validity and practical application. Use of field indicators of hydrology is vital to administering the program because inundation or saturation of any particular piece of land is variable and transitory. We use indicators as a means of determining soils are inundated or saturated for the time necessary to be a wetland. We continue to work with the Soil Conservation Service to improve our indicators. Moreover, the Corps continues to provide assistance to the National Academy of Sciences Committee on Wetlands Characterization, which has been tasked with studying the issue of wetland delineation approaches, and looks forward to the Committee's report, which is scheduled for completion on September 30, 1994.

We appreciate your continued personal interest in this important and technically complex issue. If we can provide further information please let us know.

Sincerely,

R. O. Buck
Lieutenant Colonel, U.S. Army
Assistant Director of Civil Works,
Atlantic Region

Retyped Copy of Letter from Colonel Buck to Owen Pickett

02 FEB 1994

Operations, Construction
and Readiness Division
Regulatory Branch

Honorable Owen Pickett
House of Representatives
Washington, D.C. 20505

Dear Mr. Pickett:

This is in response to your letter of January 21, 1994, requesting clarification of the U.S. Army Corps of Engineers wetland delineation policy and interpretation of the term "saturation to the surface".

You are correct that an area may be considered "saturated to the surface" even though "the top plane of the soil" is dry. The 1987 Corps of Engineers Wetlands Delineation Manual states clearly that the observations for indicators of saturation to the surface are made within a "major portion of the root zone of the prevalent vegetation". The entire root zone, which is usually within 12 inches of the surface, is the area inspected for evidence of wetland hydrology. The presence of field indicators results from anaerobic conditions (i.e., the lack of oxygen) in the upper part of the soil profile. It has been the assumption of both the Corps and the Environmental Protection Agency, based on the technical literature of wetland scientists, that capillary fringe allows the upper part of the soil to become saturated above the actual water table. The degree of saturation varies with the texture and structure of the soil, among other factors. Furthermore, where the Corps determines that areas are saturated in the root zone to the extent we identify them as wetlands, the top plane of the soil is saturated, at least briefly during rain events. The top plane of the soil drys quickly because of exposure to the air. However, even where the top plane is dry the saturation in the root zone has a controlling influence on the soil and vegetation.

It is also important to understand that wetland hydrology sufficient to meet the requirements of the 1987 Corps of Engineers Wetlands Delineation Manual, must be present at some

time during the growing season. Many wetlands which are inundated during the growing season may be dry at "the top plane of the soil" during the non-growing season. Some saturated systems are virtually never visibly wet at any time at "the top plane of the soil", however, the root zone of the soil is saturated during the growing season, as reflected in the soil profile.

The reliance on the presence of field indicators is the methodology utilized by the Corps nationwide, due to both its technical validity and practical application. Use of field indicators of hydrology is vital to administering the program because inundation or saturation of any particular piece of land is variable and transitory. We use indicators as a means of determining soils are inundated or saturated for the time necessary to be a wetland. We continue to work with the soil conservation service to improve our indicators. Moreover, the Corps continues to provide assistance to the National Academy of Sciences Committee on Wetlands Characterization, which has been tasked with studying the issue of wetland delineation approaches, and looks forward to the Committee's report, which is scheduled for completion on September 30, 1994.

We appreciate your continued personal interest in this important and technically complex issue. If we can provide further information please let us know.

Sincerely,

R. O. Buck
Lieutenant Colonel, U.S. Army
Assistant Director of Civil Works,
Atlantic Region

Amicus Curiae Not Available for Filming at This Time

Supreme Court, U.S.
FILED
JUL 27 2000
OFFICE OF THE CLERK

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION AND THE AMERICAN IRON AND STEEL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RUSSELL S. FRYE*
COLLIER SHANNON SCOTT, P.L.L.C.
3050 K Street, N.W.
Washington, D.C. 20007
(202) 342-8400
Attorneys for Amici Curiae The American Forest & Paper Association and The American Iron and Steel Institute

*Counsel of Record

July 27, 2000

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Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) *("Leslie Salt I")*, *cert. denied*, 498 U.S. 1126 (1991) 6, 9, 10, 11

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995) *("Leslie Salt II") cert. denied* 516 U.S. 1071 (1996) 4, 11, 18, 22

Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1988), *rev'd on other grounds*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) 9, 10, 12, 14

National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) 6

Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) 9

Rueth v. EPA, 13 F.3d 227, 230 (7th Cir. 1993) 7

Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999) 5

Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989) 12, 13

Texas Municipal Power Agency v. EPA, 836 F.2d 1482 (5th Cir. 1988) 9

United States v. Cumberland Farms of Connecticut, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) 17

United States v. Krilich, 209 F.3d 968 (7th Cir. 2000) 17

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992), *cert. denied* 506 U.S. 875 (1992)..... 16, 19

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United States v. Lopez, 514 U.S. 549 (1995) 12

United States v. Marathon Development Corp., 867 F.2d 96 (1st Cir. 1989)..... 16

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United States v. Pozsgai, Cr. No. 8800450-01, (E.D. Pa. July 13, 1989), *aff'd,* 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied,* 498 U.S. 812 (1990) . 16

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United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) 6, 12, 20

West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table) (reported in 33 E.R.C. 1353)..... 10

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Clean Water Act, 33 U.S.C. § 1251 4

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Federal Regulations

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40 C.F.R. § 230.10(a), (d) (1999) 7

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56 Fed. Reg. 40,446, 40,449 (1991) 20

57 Fed. Reg. 26,894, 26,896 (1992) 6

58 Fed. Reg. 4995 (1993) 20

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Other Authorities

House Comm. on Transp. and Infrastructure, H.R. Rep. No. 112, 104th Cong., 1st Sess. 147 (1995) . 20

Lamunyon, Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer, 73 Neb. L. Rev. 163, 172-73 (1994) 19

Memorandum of Agreement Between the Dept. of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404

Program of the Clean Water Act, Jan. 19, 1989, reprinted in 19 Env. L. Rep. 35183 8

National Research Council, Wetlands: Characteristics and Boundaries (1995) at 77-78 19

U.S. Army Corps of Engineers, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) .. 11

U.S. Army Corps of Engineers, Wetlands Delineation Manual, p.38 (Jan. 1987) 10

U.S. EPA Report to Congress on Clean Water Act Enforcement Mechanisms, pursuant to P.L. 100-4, Section 314(b), May 11, 1990 17

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

No. 99-1178

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,
v.
UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION AND THE AMERICAN IRON AND STEEL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber and manufacture pulp, paper, and paperboard products and solid wood products. AF&PA member companies account for over 8% of total U.S. manufacturing output. [1] *Amicus curiae* the

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[1] Counsel for *amici* authored this brief in its entirety, and no one other than the listed *amici* contributed to the cost of preparing and submitting this brief.

American Iron and Steel Institute is a non-profit trade association whose members produce approximately 77% of the basic steel manufactured in this country.

The *amici* represent companies which own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. These lands contain many isolated ponds or other areas where topographical depressions from time-to-time collect rainfall runoff. The *amici* also represent companies which own and operate hundreds of isolated ponds or man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

If every such isolated, low-lying area and every such surface impoundment was considered "waters of the United States" subject to regulation under the Clean Water Act merely because it is actually or potentially used by migratory birds, then these companies could find that their intended use of their lands and the continued operation of their facilities would be constrained by U.S. Army Corps of Engineers and U.S. Environmental Protection Agency permit requirements.

Thus, the *amici* have a direct and immediate interest in the issues presented in this case, which concern fundamental aspects of how the activities of their member companies may be subject to federal regulation and whether they can reasonably know what conduct is prohibited. Moreover, since the definition of "waters of the United States" approved by the Seventh Circuit is so broad and so vague that it could apply to almost any property, almost any of the *amici's* members (and countless other landowners) could be

subjected to harsh civil or criminal penalties if the government chooses to assert that the member's particular property and activity fall under Clean Water Act jurisdiction.

Amici therefore can help provide this Court with a broader perspective on the pernicious effects that the Seventh Circuit's overextension of Clean Water Act jurisdiction could have on manufacturing and forestry throughout the country.[2]

SUMMARY OF ARGUMENT

This case concerns the central issue in determining the applicability of virtually all of the regulatory controls imposed by the federal Clean Water Act ("CWA"). If an area is considered to be a "navigable water," defined to mean a "water of the United States" in CWA section 502(7), 33 U.S.C. § 1362(7), then the U.S. Army Corps of Engineers (the "Corps") has authority to restrict or prohibit the discharge of dredged or fill materials into that area, under CWA section 404, 33 U.S.C. § 1344. The term "water of the United States" also delineates U.S. Environmental Protection Agency ("EPA") jurisdiction to restrict or prohibit point source discharges of pollutants under CWA section 402, 33 U.S.C. § 1342.

The definition of "waters of the United States" advanced by the Corps and accepted by the Seventh Circuit in the case below is so broad that it could be used to impose these Corps and EPA permitting requirements on the use of practically any occasionally

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2 Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court.

wet area of land. The effect of the Seventh Circuit ruling is that Clean Water Act permitting requirements could be applied to vast additional areas of the country, beyond what Congress envisioned, beyond the limits of the Commerce Clause, and beyond the "bounds of reason." *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995).

Under the interpretation of the Clean Water Act challenged here, potentially regulated companies and individuals have only vague guidance as to whether they are subject to the Act, but they are subject to severe sanctions if they guess wrong. Yet even the Corps and EPA have been unable to apply the "migratory bird rule" consistently, even as to a single property. Thus, the rule is not only beyond the authority granted in the Clean Water Act and beyond the limitations of the Commerce Clause, it is impermissibly vague, as well.

ARGUMENT

I. DESIGNATION AS "WATERS OF THE UNITED STATES" IMPOSES SUBSTANTIAL CONSTRAINTS ON THE USE OF PROPERTY.

The regulatory authorities created by the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"), apply to "navigable waters," which the CWA in turn defines as "waters of the United States." CWA section 502(7), 33 U.S.C. § 1362(7). This Court has made clear that Congress intended to control not only discharges into traditional navigable-in-fact waters, but also any other discharges into areas that might affect those waters (such as tributaries or adjacent wetlands). *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33, 135-38 (1985).

The instant case involves an issue which is not explicitly discussed in the legislative history and has not been consistently resolved by the courts—whether the CWA also extends to isolated waters, whether naturally occurring or man-made, that do not have such a connection to traditional navigable waters.[3] The Court expressly reserved that issue in *Riverside Bayview Homes*, 474 U.S. at 131 n.8. The Seventh Circuit has now concluded that the Clean Water Act can apply to an isolated water or wetland,[4] if it is used as habitat by migratory birds, without any reference to legislative history or to any judicial decision involving a wetland or "other water" without a connection to navigable-in-fact waters. *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 191 F.3d 845, 851 (7th Cir. 1999) ("SWANCC"). The Ninth Circuit implicitly reached the same conclusion,

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3 There is nothing in the objectives of CWA § 101(a), 33 U.S.C. § 1251(a), nor in the legislative history of the CWA, that suggests Congress intended to address areas which only occasionally collect water (or man-made excavations), if those areas have no potential impact upon traditional navigable waters or even on any other surface water body. Rather, the legislative history demonstrates that Congress was concerned about waters with some connection to and potential impact upon other surface waters. In discussing the geographic scope of the Clean Water Act, Congress spoke of a need to control the discharge of pollutants at its source because "water moves in hydrologic cycles," S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1971), but concluded that controls therefore must be applied "to the navigable waters, portions thereof, and their tributaries." *Id.*

4 The Corps defines "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(a) (1999).

again without citing relevant legislative history or case law, while the Fourth Circuit has determined more broadly that such isolated waters are beyond the bounds of the Clean Water Act. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) ("*Leslie Salt I*"), *cert. denied*, 498 U.S. 1126 (1991); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

This tenuous link between use or potential use by migratory birds and regulation under the Clean Water Act would have far-reaching consequences. If an isolated, low-lying area or a man-made pond is determined to constitute a "water of the United States," then the CWA and implementing regulations impose severe limitations on a landowner's use of that area. Under CWA section 404, 33 U.S.C. § 1344, a U.S. Army Corps of Engineers ("Corps") permit is required in most instances prior to discharging dredged or fill materials into a "water of the United States." Under the Corps regulations, this means that a permit may be required for dredging of the area; placing fill for the construction of structures, site development, or impoundments; grading or road construction; mechanically clearing the land; or even cutting a ditch for the purpose of draining an area. *See* 33 C.F.R. §§ 323.2-323.4 (1999) and, *e.g.*, *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). *See also* 57 Fed. Reg. 26,894, 26,896 (1992). Various forestry or farming practices may involve activities which, if conducted on land considered to be "waters of the United States," would constitute the discharge of dredged or fill material, particularly during road construction, harvesting, and replanting.[5]

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5 Although CWA § 404(f)(1), 33 U.S.C. § 1344(f)(1), contains exemptions from Corps permitting requirements for certain forestry or farming activities conducted in accordance with statutory criteria, those exemptions are limited by their terms and by CWA § 404(f)(2) and Corps regulations and guidance. *See* 33 C.F.R. § 323.4 (1999).

A permit to use the land as desired may be denied outright, as it was in the instant case, or it may be issued only after the landowner agrees to redesgn the project or engage in costly compensatory "mitigation" measures. *See, e.g., 40 C.F.R. § 230.10(a), (d) (1999); EPA and Dept. of Defense "Memorandum of Agreement Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines," 54 Fed. Reg. 51,319 (1989);* 60 Fed. Reg. 58,605 (1995). An owner of land determined by the Corps or EPA to be a "water of the United States" is not only stripped of the right to freely develop, landscape or cultivate the area, but may also be prevented from securing bank loans or obtaining title insurance for the property or otherwise managing the property as a productive asset. *See, e.g., Rueth v. EPA,* 13 F.3d 227, 230 (7th Cir. 1993) (noting the substantial curtailment of a landowner's property interest after EPA's exercise of "water of the United States" jurisdiction).

The effect of a broad definition of "waters of the United States" extends even further, however. Under CWA sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, a permit from EPA or a delegated state is required for any "discharge of a pollutant," which in turn is defined as "any addition of any pollutant to navigable waters from a point source."[6] The

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6 CWA §. 502(12), 33 U.S.C. § 1362(12). "Pollutant" is defined very broadly in CWA § 502(6), 33 U.S.C. § 1362(6), encompassing a wide range of both process and non-process water discharges.

regulatory definition of "waters of the United States" promulgated by the U.S. Environmental Protection Agency ("EPA"), which administers the pollutant discharge permitting program, is virtually identical to the Corps' definition of the same term which was applied by the Seventh Circuit in the case below.[7] Thus, an area determined to be a "water of the United States" is not only subject to Corps permitting requirements for activities in the area that may discharge dredged or fill material but also is subject to EPA CWA section 402 discharge permit requirements for any point source discharge of "pollutants" to the area.[8]

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7 *Cf.* 40 C.F.R. § 122.2 (1999) *with* 33 C.F.R. § 328.3(a) (1999). For additional explanation of the roles of EPA and the Corps under the CWA, *see* Memorandum of Agreement Between the Dept. of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act, Jan. 19, 1989, *reprinted in* 19 Env. L. Rep. 35183 and *United States v. Mills*, 817 F. Supp. 1546, 1551 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

8 *See, e.g., Laguna Gatuna, Inc. v. Browner, et al.*, 58 F.3d 564, 565 (10th Cir. 1995), *cert. denied* 516 U.S. 1071 (1996) (EPA issued cease and desist order to company that disposed of wastewater without a discharge permit into a privately-owned sinkhole, which, by EPA's own admission, "was not hydrologically connected to other waters and there were no recreational, industrial or other uses that could affect interstate commerce," based solely on the presence of some dead migratory birds near the sinkhole).

II. THE DEFINITION OF "WATERS OF THE UNITED STATES" ADVOCATED BY THE CORPS PLACES VIRTUALLY NO LIMITS ON CLEAN WATER ACT JURISDICTION.

The Corps has defined "waters of the United States" so broadly as to include any isolated wetland or "other water" with no connection to navigable-in-fact waters. 33 C.F.R. § 328.3(a) (1999); *see also* EPA definition at 40 C.F.R. § 122.2 (1999). In fact, the Corps and EPA assert, and some courts have agreed, that "waters of the United States" may include isolated areas that are only seasonally or ephemerally wet. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). Rainwater collecting on dry land for a few days may be enough to create a regulated wetland. *See Leslie Salt Co. v. United States*, 700 F. Supp. 476, 487 (N.D. Cal. 1988), *rev'd on other grounds*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). The term also can encompass man-made ponds or impoundments created out of dry land, such as the ponds used for a multitude of industrial purposes.[9] Moreover, both the Corps (as demonstrated

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9 *See, e.g., Leslie Salt I*, 896 F.2d at 358-60. EPA and the Corps do exempt certain waste treatment ponds from the definition of "waters of the United States," but even that exemption is limited and has been applied inconsistently. 40 C.F.R. § 122.2 and 33 C.F.R. § 328.3(a). For example, EPA has argued that its "treatment pond exception is simply notice to polluters that it will not generally regulate" discharges into waste treatment ponds, "not a promise that it never will." *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988). EPA also has argued in some instances that its waste treatment exclusion does not apply to any system constructed in an area that previously fell within EPA's overly broad definition of "waters of the United

by the instant case) and EPA claim that such "waters" fall within their CWA jurisdiction even if the only putative connection to interstate commerce is that the area is or could potentially be used as habitat by migratory birds. *See, e.g., Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency,* 999 F.2d 256, 261 (7th Cir. 1993).

Land can be dry the vast majority of time and still be considered a "water of the United States." For example, a farm can be considered a wetland, and therefore a "water of the United States," if it is inundated or saturated to within one foot of the surface for just 15 days during the growing season; other types of topographic features need only be inundated or saturated seven days a year. *United States v. Hallmark Construction Company*, 30 F. Supp. 2d 1033, 1038, 1040 (N.D. Ill. 1998); Corps of Engineers Wetlands Delineation Manual, p.38 (Jan. 1987). The salt crystallizers at issue in the *Leslie Salt* cases were located in an area that had been pasture land in the past, 896 F.2d at 355, and were "constructed on dry land." *Leslie Salt,* 700 F. Supp. at 480..[10] The

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States." *See West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table), 33 E.R.C. 1353.

10 The district court clearly rejected the Corps' assertion that the former salt crystallizers constituted "other waters" or "wetlands" because of occasional "ponding of water on otherwise dry land." 700 F. Supp. at 485. "After a rain that is heavy or long enough, any soil will become temporarily saturated. . . . [I]t is simply not enough that rain water collect on property for a few days for that property to become a water of the United States." *Id.* at 487. Yet the Ninth Circuit concluded in *Leslie Salt I* that the district court's findings were irrelevant for a

temporarily wet areas at issue there "have no hydrological connection to any other body of water," and "for much of the year they do not even exist." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395 (9th Cir. 1995) ("Leslie Salt II").

Consequently, under this definition, almost any "water" (including areas that are only occasionally wet or soggy) could be determined by the Corps or EPA to be within their regulatory jurisdiction. Millions of acres of *land*[11] and millions of landowners are potentially subject to restrictions under the CWA as a result of these agencies' definitions of "waters of the United States."

The Corps' interpretation at issue in this case, that an isolated "other water" falls under the CWA if it is "or would be" used as "habitat" by migratory birds, 51 Fed. Reg. 41,206, 41,217 (1986), is so broad that in practice it represents no limitation at all on Corps jurisdiction, placing virtually all areas containing water, or that are even occasionally saturated, within

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determination of the Corps' jurisdiction over "waters of the United States." 896 F.2d at 360.

11 Under present wetlands determination policy, approximately 111 million acres of land in the United States could be affected as regulated wetlands. *Water Pollution*, 22 Env't Rep. (BNA) 2169, 2194, January 24, 1992. Millions of additional acres of normally dry washes, playas, and other areas are also potentially regulated as "waters of the U.S.," as in *Quivira Mining, supra*. The Corps conducted a study that identified over 8 million isolated depressions of less than one-half acre that could be considered jurisdictional wetlands under the "migratory bird test." U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995).

the category of "waters of the United States." There is no requirement that the use by migratory birds be "substantial," although it is clear that the commerce power does not reach activity which merely "affects" interstate commerce, but rather there must instead be a showing that "the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). In fact, it is sufficient in the Corps' view if the area merely has the potential to be used by migratory birds. 51 Fed. Reg. at 41,217; *Cargill, Inc. v. United States*, 516 U.S. 955, 958 (1995) (Thomas, J., dissenting from denial of certiorari). [12] There is nothing in the record to suggest that any use of an area by migratory birds, no matter how insignificant, has a substantial impact on interstate commerce. The mere potential for such use has no effect at all, much less the substantial effect required by this Court's jurisprudence.

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12 While the court below did not believe the issue of *potential* effect was before it (191 F.3d at 852), the "migratory bird rule" that was before it explicitly addresses "waters" that "would be used" by migratory birds, and, in fact, the Corps has already asserted that its jurisdiction can be founded on such a speculative basis. *See, e.g., United States v. Wilson*, 133 F.3d at 257; *Leslie Salt*, 700 F. Supp. at 485 ("The Corps' witnesses would extend that jurisdiction not only to actual use by migratory birds, but also to potential use."); *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989) (Table) (reported at 20 Envtl. L. Rep. 20008) (Corps directive that "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States"); *Hoffman Homes*, 999 F.2d at 259 (enforcement action based on "the theoretical possibility" of use by migratory birds); *id.* at 261.

The Corps' interpretation does not even require that migratory *water*fowl use or potentially use the site; in fact, the Corps has asserted jurisdiction over property because of its use by woodpeckers and songbirds. *See Tabb Lakes*, 715 F. Supp. at 728.[13] In short, it is difficult to imagine an area of land that could not be considered "waters of the United States" under this expansive, though not congressionally foreseen, definition.

There are somewhere between 2.5 and 6 billion birds in the United States, two-thirds of which migrate. *SWANCC*, 191 F.3d at 850. *See also* 50 C.F.R. § 10.13 (1999) (U.S. Fish and Wildlife Service's list of about 1000 species of migratory birds, including such common birds as pigeons, starlings, sparrows, and wrens.) The Seventh Circuit acknowledged that "[v]irtually any body of water could serve as temporary habitat for at least some of these birds," but somehow took comfort in the fact that the "migratory bird rule" addresses "waters" that are or could be used as "habitat." 191 F.3d at 850. While the term "habitat" is not defined in the Corps' rules or interpretation, the court below applied a dictionary definition and concluded that, because the Corps has to "make a factual determination that a particular body of water provides a habitat for migratory birds," the

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13 This Court can take judicial notice of the fact that birds such as woodpeckers and songbirds could make use of practically any undeveloped property, regardless of whether any significant ponding of water occurs there. In fact, the government conceded in oral argument in the *Hoffman Homes* case that "migratory birds would land and drink from a puddle in the median of a highway." *Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency*, 961 F.2d 1310, 1321 n. 9 (7th Cir. 1992), *vacated* 975 F.2d 1554.

migratory bird rule is limited and does not sweep virtually all "waters" under the CWA. *Id.*

While the theoretical merits of that argument are debatable, the facts are not: the Corps and EPA have applied the migratory bird rule in situations where little or no information about the extent of a bird's use of the "water" as "habitat" was available. In *Laguna Gatuna*, EPA issued a cease and desist order based on its observation of a few dead migratory birds near the company's wastewater evaporation pond. 58 F.3d at 565. In *Hallmark Construction*, 30 F. Supp. 2d at 1041-42, the Corps pursued an enforcement action apparently based on the discovery of shotgun shell casings on the parcel and a witness who testified that he might have seen geese near the parcel on one occasion. Clearly the Corps and EPA do not view the term "habitat" as any constraint on their ability to assert that migratory bird use of whatever nature and duration renders an area subject to CWA jurisdiction.

The Corps does not even pretend to require that any use by migratory birds be "substantial." It should be obvious from the incredibly broad reach of the Corps' and EPA's view of "waters of the United States" that many areas over which they assert jurisdiction could be modified or even eliminated without any perceptible effect on interstate commerce. In *Leslie Salt*, for example, it seems clear that the impact on migratory birds from modifying or filling the company's property could not have been substantial -- the areas in question collect rainwater for only "a few days," 700 F. Supp. at 487, and yet are adjacent to the San Francisco Bay National Wildlife Refuge and close to the bay itself. 55 F.3d 1390-91. Moreover, since the government asserts that "waters of the United States" can include man-made water bodies (such as the pits from gravel mining in the instant case or the salt crystallizers in *Leslie Salt*), which are not even a natural habitat for migratory birds, it is hard to see

how such water bodies that did not previously exist could have a significant impact on the natural migration of birds. In any event, the Corps and EPA have simply made no regulatory findings to support the conclusion that the isolated natural or man-made waters and wetlands in this country have a substantial impact on interstate commerce, either individually or cumulatively.

III. The CORPS' INTERPRETATION OF "WATERS OF THE UNITED STATES" PROVIDES AN IMPERMISSIBLY VAGUE STANDARD FOR ASSESSING HARSH CIVIL AND CRIMINAL PENALTIES.

While the cost and regulatory burden imposed by the Corps' and the Seventh Circuit's expansive definition of "waters of the United States" represent a tremendous potential impact on *amici* and other businesses, municipalities, and private citizens, the impact is greatly magnified by the harsh civil and criminal penalties available under the Clean Water Act. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides for a civil penalty of up to $27,500 per day for a violation of the prohibition on unpermitted discharges,[14] while CWA section 309(c), 33 U.S.C. § 1319(c), could impose a criminal penalty of up to $25,000 per day of violation or imprisonment for not more than one year, or both, for even negligent violations.

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[14] The CWA was amended in 1987 to allow for civil penalties of up to $25,000 per day, Pub. L. No. 100-4, 101 Stat. 7, but as a result of the Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461 as amended by 31 U.S.C. § 3701, that amount has been increased to $27,500.

These penalties are not just theoretical: the United States has been vigorously prosecuting companies and individuals for placing fill material in areas which the government considers wetlands or other "waters of the United States."[15] In many instances, these enforcement actions are against individuals or companies that did not think their land constituted "waters of the United States." See, e.g., *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992), *cert. denied* 506 U.S. 875 (1992).

In fact, this Court denied a petition for a *writ of certiorari* in a case where the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," which "mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of 'discharging pollutants into navigable *waters* of the United States.'" *United States v. Mills*, 817 F. Supp. at 1548 (emphasis in original). Nevertheless in that case a father and son were each sentenced to 21 months incarceration for placing fill material on a waterfront lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *Id.*

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15 *See, e.g., United States v. Pozsgai*, Cr. No. 8800450-01, (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for filling a wetlands without a permit); *United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company fined $100,000 and its senior vice-president fined $10,000 and given a suspended six-month sentence with one year probation for filling in wetlands without a permit).

In addition to these serious penalties, the Corps or EPA may require companies to restore wetlands following a determination by the Corps or EPA that a piece of property is a "water of the United States," *see, e.g., United States v. Cumberland Farms of Conn.*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); and in fact EPA "enforcement efforts . . . generally seek removal of the fill and restoration of the site."[16]

The companies and landowners faced with these severe potential penalties, however, have been provided few, if any, objective criteria by which to determine whether the use of their land requires a Corps or EPA permit. Companies and individuals today are thus faced with a situation even more egregious than that which the district court found "disturbing" in *Mills*. While the lot in that case had no standing water and did not "appear to be" a wetland or a marsh, swamp, or bog, at least it was located adjacent to a bay and had a depression that sometimes carried rainwater runoff from inland to the bay. 817 F. Supp. at 158. After the lower court decision here, though, a felony conviction could be based on activities in an area that is not near any surface water body and is either excavated in dry land or is a depression that is only temporarily wet after rainfall, so long as the area might sometime be used by some type of migratory bird.

Simply put, the regulated community cannot ascertain the boundaries of Clean Water Act jurisdiction under the rule stated by the Corps and EPA

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16 EPA Report to Congress on Clean Water Act Enforcement Mechanisms, pursuant to P.L. 100-4, Section 314(b), May 11, 1990 at 22; *see also United States v Krilich*, 209 F.3d 968, 970 (7th Cir. 2000).

and approved by the courts in the *SWANCC*, *Leslie Salt*, and *Hoffman Homes* decisions. Such a nebulous and subjective standard for determining the applicability of the stringent civil and criminal penalties at issue here must be unconstitutionally vague. *See, e.g., Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (statute which "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."); *Kolender v. Lawson*, 461 U.S. 352 (1983) (statute is unconstitutionally vague because it fails to describe with particularity what is required, encouraging arbitrary and discriminatory enforcement).[17] The problem is aggravated by the fact that, at least according to the Ninth Circuit in *Leslie Salt II*, anyone who guesses wrong about the application of these uncertain and *ad hoc* criteria to his land is subject to a *mandatory* civil penalty. 55 F.3d at 1396-97.

EPA has even acknowledged that its determinations regarding wetlands and "waters of the United States" are undertaken on a case-by-case and often inconsistent basis. For example, in the preamble to its National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region VI set out a list of factors to be considered in determining whether certain "playas" are "waters of the United States." 58 Fed. Reg. 7610, 7621 (1993). EPA also stated, however, that the factors "are neither exclusive nor regulatory; they are simply examples of the sort of factors EPA will

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17 This situation also argues strongly for a narrow construction of "waters of the United States" under the rule of lenity. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

probably apply in making individual determinations." *Id.* (emphasis added). EPA adds that "[t]here are various types of commerce which may be affected by the degradation of many playa lakes, but EPA has to date asserted jurisdiction over them only on a case-by-case basis, generally in the context of enforcement actions." *Id.* at 7620. Similarly, courts have recognized the substantial technical inconsistencies associated with wetlands determinations. In *United States v. Ellen*, for example, the court addressed the delineation of "waters of the United States" by EPA and the Corps, and recognized that "[t]he absence of a uniform federal methodology resulted in inconsistent wetlands determinations for similar areas."[18]

Both EPA and the Corps have acknowledged the significant uncertainty accompanying decisions to assert CWA jurisdiction over wetlands.[19] In its 1990

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18 961 F.2d 462, 465 (4th Cir. 1992) (notwithstanding inconsistencies in wetland determinations, defendant convicted of five felony counts for filling wetlands after a cease and desist order from the Corps).

19 Since 1987, EPA and the Corps have employed three distinct wetlands delineation manuals for the identification of regulated wetlands. *See, e.g., Ellen*, 961 F.2d at 464-65; Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb. L. Rev. 163, 172-73 (1994). This dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands. Lamunyon, *supra*, 73 Neb. L. Rev. at 173-74; National Research Council, *Wetlands: Characteristics and Boundaries* (1995) at 77-78 ("NRC Report").

Report to Congress, *supra* n. 16, EPA stated that: "The agencies' differing interpretations of issues related to the geographic jurisdiction of section 404 or whether a particular activity is regulated or has been authorized, have hampered section 404 enforcement." *Id.* at 20; *see also* 65 Fed. Reg. 21, 292 (2000); 58 Fed. Reg. 4995 (1993); 56 Fed. Reg. 40,446, 40,449 (1991). A committee of the U.S. House of Representatives also observed that "EPA has not consistently applied the regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 112, 104th Cong., 1st Sess. 147 (1995).

The Corps and EPA cannot even agree on the application of their definition of "waters of the United States" to a single property. In the instant case, the Corps twice told SWANCC that its land was not subject to CWA jurisdiction, after an on-site inspection, before ultimately concluding that it was. 191 F.3d at 848. In *Laguna Gatuna*, EPA sent the company a letter declaring that its sinkhole was not a "water of the United States," but the Agency reversed itself later. 58 F.3d at 565. In *United States v. Wilson*, the Corps obtained felony convictions of a company and its CEO for filling an area that the Corps had previously concluded met the hydrologic definition of "wetland" but was not clearly within the definition of "waters of the United States." 133 F.3d at 251.[20]

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20 *See also Avoyelles Sportsmen's League*, 715 F.2d at 901-903 (Corps consultant determined 35% of parcel was wetlands, EPA concluded the proportion was about 80%, and the U.S. Fish & Wildlife Service asserted all of it was wetlands).

If any area of land that is wet for a minimal amount of time can be brought within CWA jurisdiction merely because it "may provide habitat to migratory birds," then countless landowners are in jeopardy of violating the CWA by filling or conducting work in an area they had no reason to believe was a "water of the United States."[21] Landowners should not be subjected to crushing sanctions for guessing wrong about the nature of present or future bird use of their property—especially when not even the Corps or EPA can get it straight.[22]

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21 EPA has acknowledged that its broad and uncertain assertion of CWA jurisdiction may result in EPA bringing an enforcement action for discharges to a water body that the discharger regarded as its own wastewater treatment system. National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7620-21 (1993). As a result, "companies and individuals today live under a very real fear that cooling ponds and surface impoundments they are using for waste treatment may suddenly be determined to be navigable waters, and subject to the full panoply of Clean Water Act requirements." H. R. Rep. No. 112, 104th Cong., 2nd Sess. 158 (1995).

22 As an indication of the pure arbitrariness of the application of the migratory bird rule: the dissent in the Fourth Circuit *Tabb Lakes* decision suggests that use by ducks and geese may be enough, but that use by robins and finches may not. 20 Envtl. L. Rep. 20008 at n.2 (4th Cir. 1989)

CONCLUSION

The Corps of Engineers' assertion that "waters of the United States" includes isolated lands which are subject to only occasional saturation or ponding, or artificial ponds created on normally dry land, solely because those areas are or could be used by migratory birds, is so broad as to subject huge additional areas of this country to Corps (and EPA) permitting requirements. There is no reason to believe that Congress intended Clean Water Act jurisdiction to extend to the vast areas of the country where water may pond or soils may be saturated temporarily after rainfall or snowmelt on normally dry ground. As acknowledged even by the Ninth Circuit in *Leslie Salt II*, "[c]learly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977." 55 F.3d at 1394. Even if it did, however, the Constitution would still require a substantial effect on interstate commerce to authorize such action by Congress.

Potential or even actual use as habitat by migratory birds does not provide the required substantial effect on interstate commerce. In fact, the government itself has conceded that almost any puddle could, under its theory, be used by migratory birds and therefore subject to CWA jurisdiction. The government can offer no indication that Congress intended to cast the regulatory net that wide, even if the Constitution allows it. Nor is there any indication that the Corps assessed the impact on interstate commerce of these myriad isolated "waters," much less determined that their use or non-use by migratory birds would have the "substantial" effect on interstate commerce that this Court's jurisprudence requires.

Moreover, the migratory bird rule provides an impermissibly vague and subjective standard for the

crucial determination of whether Clean Water Act restrictions apply. Countless businesses, municipalities, and private landowners should not be faced with severe fines and penalties under the CWA just because their land may at some time be wet and a migratory bird may land there.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF JAMES J. WILSON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

James J. Wilson submits this brief *amicus curiae* in support of the petitioner.[1] All parties to this case have given their written consent to the participation of Mr. Wilson, and copies of these written consents have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

Mr. Wilson was the prevailing party in *United States v. Wilson*, a criminal wetlands prosecution brought in the District of Maryland in 1996. His conviction at trial and 21 month sentence were overturned by the Court of Appeals for the Fourth Circuit, see 133 F.3d 251 (4th Cir. 1997), in a decision virtually ignored by the Seventh Circuit below, see *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845, 851-52 (7th Cir. 1999).

Mr. Wilson submits this *amicus* brief because the *Wilson* prosecution sheds light on two significant matters relevant to the present controversy: (1) the government's repeated and aggressive efforts to bring criminal prosecutions under the Clean Water Act ("CWA" or "Act"), based on expansive statutory and regulatory interpretations propounded by the U.S. Army Corps of Engineers ("Corps") in civil cases and administrative proceedings; and (2) the government's limitless view of the Corps' jurisdiction to define and regulate waters and wetlands under the CWA, as exemplified by the government's positions before, during, and in the aftermath of the *Wilson* case. The *Wilson* prosecution persuasively demonstrates that the government believes the Corps has the power to

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[1] Counsel for *amicus curiae* James J. Wilson wrote this entire brief. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

regulate all waters anywhere, and will employ the full force of the criminal sanction to further its regulatory objectives, even at the expense of such basic criminal law protections as fair warning and mens rea.

* * *

Mr. Wilson is the founder and former Chief Executive Officer of Interstate General Co., L.P., a publicly traded land development company. Over the past three decades and at a cost in excess of $150 million, Mr. Wilson has designed and developed the 9100-acre planned community of St. Charles, Maryland.

Mr. Wilson developed the St. Charles project in partnership with the federal government and after years of careful environmental planning, which included detailed plans for the ditching and draining of wet areas on the property. The Corps reviewed these plans (as did other federal agencies) and concluded that the CWA did not provide jurisdiction over the development as proposed. Thereafter, for nearly 20 years, Mr. Wilson developed the project in accordance with these plans and without the Corps raising any CWA-related concerns.

In September 1995, Mr. Wilson and two limited partnerships were indicted in the District of Maryland for four felony and four misdemeanor violations of the CWA, 33 U.S.C. § 1251 *et seq*. Following a seven week trial, a jury convicted each defendant on the four felony counts charging them with knowingly discharging fill material (*i.e.*, dirt) into wetlands without a permit, in violation of 33 U.S.C. §§ 1319(c)(2)(A) and 1311(a). In June 1996, the district court sentenced Mr. Wilson to 21 months imprisonment, one year of supervised release, and a $1,000,000 fine. The partnership defendants were jointly fined $3,000,000, placed on probation for five years, and

ordered to implement a wetlands restoration and mitigation plan proposed by the government.

The properties that were at issue in the *Wilson* prosecution are situated more than ten miles from the Chesapeake Bay and more than six miles from the Potomac River, and are as far removed from navigable waterways as any land in southern Maryland. Nevertheless, the government argued that wetlands on these properties were subject to federal regulation as "waters of the United States" because they form part of the "drainage pattern" in the region, and "eventually" drain or flow (through a series of intermittent streams and non-navigable creeks) into larger waters. Under this theory, few (if any) waterbodies in the country would be beyond federal authority.

On appeal, the Fourth Circuit reversed Mr. Wilson's convictions, in part because it held invalid one of the federal regulations – 33 C.F.R. § 328.3(a)(3) – on which the government's limitless jurisdictional theory was based. *See Wilson*, 133 F.3d at 257. The court of appeals found that by defining "waters of the United States" to include "[a]ll other waters," the use, degradation, or destruction of which "could affect" interstate commerce, section 328.3(a)(3) "expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Id.* "[A]s a matter of statutory construction," the Fourth Circuit held, "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.*

Following remand to the district court, the government dismissed all criminal and civil charges against Mr. Wilson, and accepted a corporate plea on a single felony count from one of the limited partnerships.

SUMMARY OF ARGUMENT

In determining the reach of the phrase "waters of the United States," 33 U.S.C. § 1362(7), and thus the scope of the Corps' jurisdiction under the CWA, this Court should find that the statute regulates only waters that are navigable in fact, interstate, or closely related to navigable or interstate waters. This standard comports both with the language and history of the CWA, and with the scope of authority delegated to the federal government under the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. Because the Corps' so-called "migratory bird rule," 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986), interprets "waters of the United States" to include isolated, intrastate waters that have nothing to do with navigable or interstate waters, this Court should hold that it is invalid.

As the Court confronts this question of statutory construction, two significant matters that relate to the government's enforcement of the CWA should inform its decision. First, although the present appeal involves a civil permit dispute, violations of the CWA can and do result in severe criminal penalties. In seeking such penalties, the government has repeatedly based criminal prosecutions on expansive statutory and regulatory interpretations obtained by the Corps in civil and administrative proceedings where *Chevron* deference is routinely provided. The fair warning concerns implicated by this practice are particularly acute given the diluted mens rea requirement many courts have applied under the Act. Precisely because the CWA is a criminal statute, *amicus* submits that it should be interpreted consistently as such, with any ambiguities being resolved against the government. No deference should be given to the Corps' informal interpretations of the Act or the regulations promulgated thereunder.

Second, the Corps has failed to draw any line – or even to hint at the possibility that any line could or should be drawn – limiting the reach of federal authority under the Clean Water Act. Rather, by employing various regulatory schemes, all of which espouse a theory of jurisdiction that is without bounds, the Corps has revealed its intent to regulate all waters anywhere. As the history of the *Wilson* prosecution demonstrates, the government does not concede any jurisdictional limits on the Corps' power to regulate the nation's waters, and it consistently ignores and/or evades any judicial decisions that identify boundaries to federal jurisdiction.

ARGUMENT

I. Because the Clean Water Act Contains Criminal Sanctions, the Court Should Not Give *Chevron* Deference to the Corps' Statutory and Regulatory Interpretations, Including the Migratory Bird Rule.

Invoking *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Corps has repeatedly argued for and obtained expansive statutory and regulatory interpretations of the offenses prohibited and areas subject to regulation under the CWA. In the decision below, for example, the Seventh Circuit applied *Chevron* deference in approving the migratory bird rule. *See Solid Waste Agency*, 191 F.3d at 851-52. The government has then relied on these far-reaching civil and administrative precedents to buttress statutory and regulatory arguments in criminal prosecutions under the Act – a context where deference to expansive agency interpretations is impermissible. This Court should make clear that because the CWA is a criminal statute, the Corps is not entitled to *Chevron* deference in support of its questionable statutory and regulatory interpretations.

A. Criminal Prosecutions Under the Clean Water Act Are Frequent.

Since its inception in 1972, the CWA has contained a dual civil/criminal enforcement structure, whereby both civil and criminal penalties are available for violations of the various statutory offenses. 33 U.S.C. § 1319. Under this scheme, the distinction between civil and criminal violations is a mens rea element; while civil enforcement actions require no proof of mens rea, criminal prosecutions must establish a "culpable" state of mind. *Compare id.* § 1319(c) *with id.* § 1319(d). Where the requisite mens rea can be established, heightened penalties, including incarceration, are available. *See id.*

Prior to 1987, the single criminal provision of the CWA, which covered both "willful" and "negligent" violations, was only a misdemeanor, and provided for incarceration of not more than one year, and/or a fine of $2,500 to $25,000 per day of violation. 33 U.S.C. § 1319(c)(1) (1972). As a result, federal law enforcement personnel were perhaps less than enthusiastic about devoting resources to the investigation and prosecution of CWA offenses. *See* 2 *Law of Environmental Protection* § 12.08[1][d] (Sheldon M. Novick et al., eds., 2000).

In 1987, however, Congress amended and significantly enhanced the criminal penalties available under the CWA, replacing the single criminal provision with the separate misdemeanor and felony provisions that now appear at 33 U.S.C. § 1319(c)(1)-(2) (1987). Negligent violations of the Act remain punishable by up to one year imprisonment and/or a fine of up to $25,000 per day, while "knowing" violations are punishable by up to three years imprisonment, and/or a fine of from $5,000 to $50,000 per

day of violation. *See id.*[2] These maximum sanctions are doubled for violations committed after a first conviction. *See id.*

As a result of the 1987 amendments to the CWA, criminal prosecutions – and the threat of such prosecutions – are now a prominent feature of the CWA enforcement landscape. *See, e.g., United States v. Mango*, 199 F.3d 85 (2d Cir. 1999); *Wilson*, 133 F.3d 251 (4th Cir. 1997); *United States v. Hartsell*, 127 F.3d 343 (4th Cir. 1997); *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997); *Mills v. United States*, 36 F.3d 1052 (11th Cir. 1994); *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992); *see also* cases cited *infra* p. 11.

B. The Government Repeatedly Has Attempted to Blur the Distinction Between Criminal and Civil Enforcement Actions Under the Clean Water Act.

Given the lengthy periods of incarceration imposed for criminal violations of the CWA, one would expect distinct standards for proving civil and criminal violations. Nevertheless, as the history of Mr. Wilson's prosecution illustrates, there is little practical difference between a civil enforcement action and a criminal prosecution, because courts in the latter context: (1) rely on (and allow the government to argue based on) deference-driven civil and administrative precedents that expansively define statutory and regulatory terms; and (2) interpret the mens rea requirement of the felony provision as prescribing far less than a specific intent standard.

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[2] The 1987 amendments also added a provision prohibiting "knowing endangerment" – where a defendant knowingly places another person in imminent danger – with penalties of up to 15 years imprisonment and/or a fine (for individual defendants) of up to $250,000. 33 U.S.C. § 1319(c)(3).

1. The Invocation of *Chevron* Deference in Criminal Clean Water Act Prosecutions.

The considerable deference that courts have given to agency interpretations of the CWA in civil and administrative proceedings has allowed the Corps to expand significantly the reach of the statute, both in terms of the areas supposedly subject to regulation and the activities allegedly proscribed by the Act. Armed with these precedents, the government has aggressively pursued criminal prosecutions based not on the plain and unmistakable terms of the Act or the regulations promulgated thereunder, but on those same expansive statutory and regulatory interpretations.

For example, in *Wilson*, the government relied on civil precedents to argue that the waters at issue – located miles from the nearest navigable waterway – were subject to federal jurisdiction. Specifically, the government requested that in instructing the jury on the terms "waters of the United States" and "adjacent," the district court incorporate standards derived solely from civil case law. Thus while the Code of Federal Regulations defines "adjacent" as "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), the government sought (and received) an additional instruction that a wetland may be "adjacent" even "without a direct or indirect surface connection to other waters of the United States" – a dramatic expansion of the Act based on prior civil decisions. *Wilson*, 133 F.3d at 258. *Cf. Ellen*, 961 F.2d at 465-66 (government witnesses at criminal trial permitted to testify that certain areas were wetlands based on definitions contained in Corps' "wetland delineation" manual).

The government in *Wilson* also relied extensively on civil cases to support its contention that the activities at issue were proscribed by the Act. Specifically, the

government sought to incorporate standards derived from civil cases when instructing the jury on the terms "pollutant," "discharge of dredged or fill material," and "point source." Thus, for example, in the absence of any explicit statutory or regulatory support for its claim that "sidecasting" (the placement of excavated dirt alongside drainage ditches in wetlands) constitutes the "discharge" of a pollutant, the government relied on *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Yet as the Fifth Circuit made clear in that civil case, its decision was guided by deference to an interpretation espoused by the Corps and the Environmental Protection Agency ("EPA"). *See id.* at 924 n.43 ("We hold only that the agencies' interpretation that redepositing materials may be a discharge requiring a § 404 permit is '"correct" to the extent that it can be said with complete assurance that any particular interpretation of [this] complex statute . . . is the "correct" one.'") (citation omitted). In other words, a statutory interpretation originally derived in a civil setting using deference is then held out by the government in a subsequent criminal prosecution as the applicable legal standard, despite the absence of any other statutory or regulatory support.

The government's misuse of such civil precedents in seeking criminal convictions is not an uncommon practice. *See, e.g., United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 648-49 (2d Cir. 1993) (rejecting government's reliance on "broad dicta" from civil case in support of its argument that a "human being" can constitute a "point source" under the Act, and reversing conviction). This process of defining standards for criminal prosecutions by bootstrapping from prior *Chevron*-based decisions deprives criminal defendants of fair warning. *See infra* pp. 12-14.

2. The Dilution of Intent Requirements in Criminal Clean Water Act Prosecutions.

The government's use of expansive statutory and regulatory interpretations arrived at in civil proceedings to sustain criminal convictions is especially troubling in view of its simultaneous efforts to dilute the mens rea requirement for CWA convictions. Although the Act provides that a felony is committed only if one "knowingly violates" the statute's proscriptions, 33 U.S.C. § 1319(c)(2)(A), the government consistently has taken the position that this language requires proof neither of the defendant's knowledge of the law, nor the defendant's knowledge of all of the relevant facts that render his conduct illegal, nor any culpable state of mind on his part. This watered-down intent standard, which some courts of appeals have adopted, see *infra* p. 11, leaves a defendant virtually powerless to rebut any showing that he acted with a "criminal" state of mind.

For example, Mr. Wilson was charged with "knowingly violat[ing]" 33 U.S.C. § 1311(a), a substantive offense consisting of four elements: (i) the addition of a pollutant; (ii) from a point source; (iii) into waters of the United States; (iv) without a permit. *Wilson*, 133 F.3d at 260. In instructing the jury on the requisite mens rea, the district court required the government to prove only that Mr. Wilson knew: "one, that the areas which are the subject of these discharges had the general characteristics of wetland; and, two, the general nature of [his] acts." *Id.* Such an instruction barred consideration of all evidence of good faith and lack of criminal intent on Mr. Wilson's part. Instead of being required to prove that he deliberately intended to violate the law, the government was obligated to show only that he knew that dirt had been added to the properties in question.

On appeal, the Fourth Circuit held that the district court's mens rea instruction was erroneous, warranting a new trial. *See Wilson*, 133 F.3d at 265. But the court of appeals did not adopt a specific intent standard; rather, the government was required to prove only the defendant's knowledge of the facts establishing each essential element of the offense. *See id.* at 262. The Fifth Circuit has adopted a similar test. *See United States v. Ahmad*, 101 F.3d 386, 389-91 (5th Cir. 1996). But other courts of appeals – specifically, the Second, Eighth, and Ninth Circuits – have acquiesced in the government's contention that felony CWA convictions may be based upon a defendant's knowledge of only the most minimal facts. *See United States v. Sinskey*, 119 F.3d 712, 715-17 (8th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 537-41 (2d Cir. 1995); *United States v. Weitzenhoff*, 35 F.3d 1275, 1283-86 (9th Cir. 1993). In each of these cases, the government was required to show only that the defendants were aware they were discharging the pollutants in question – a wholly lawful activity expressly authorized by their permits – not that they knew their discharges exceeded permit limitations. In at least these circuits, then, CWA defendants can be convicted despite a good faith, albeit mistaken, belief that the discharge in question was authorized by permit.

Because none of the circuits (thus far) has interpreted § 1319(c)(2)(A) as imposing a specific intent standard, and because several circuits have interpreted that provision as essentially consistent with a form of strict liability, fair warning concerns become particularly acute in criminal CWA prosecutions.

C. No Deference Should Be Given to the Corps' Informal Interpretations of the Clean Water Act.

In evaluating the agency's statutory interpretation at issue here, *i.e.*, the migratory bird rule, the Court should not apply *Chevron* deference, but should instead use the rule of strict construction applicable in criminal prosecutions.

1. *Chevron* Deference is Inappropriate in Criminal Clean Water Act Prosecutions.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). This "time-honored interpretive guideline" serves to ensure both that citizens are given fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985); *see also United States v. Bass*, 404 U.S. 336, 347-48 (1971). The rule of strict construction is no less applicable in criminal prosecutions for violations of the CWA. *See, e.g., Plaza Health Labs.*, 3 F.3d at 649 (applying rule of lenity to construe ambiguous statutory term "point source" strictly in favor of defendant in CWA prosecution); *United States v. Borowski*, 977 F.2d 27, 31-32 (1st Cir. 1992) (strictly construing ambiguous term in "knowing-endangerment" provision in CWA prosecution). As a result, deference to agency interpretations of ambiguous statutes and regulations is inappropriate in the criminal setting.

First, giving deference to an agency's expansive interpretation of an ambiguous CWA provision in a criminal context would be incompatible with the bedrock principle of fair warning. Under *Chevron*, if "Congress has not directly addressed the precise question at issue," the reviewing court typically will defer to the agency's

interpretation as long as it is reasonable. 467 U.S. at 843. In a criminal case, however, the government may not seize on statutory ambiguities to criminalize activities that Congress has not expressly outlawed. *See Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 91-94 (1959); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892). Similarly, although this Court has recognized that, given precise criteria of delegation, administrative agencies have power to define criminal proscriptions through regulations, see *Loving v. United States*, 517 U.S. 748, 768 (1996), any such regulation "must be explicit and unambiguous in order to sustain a criminal prosecution." *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 621 (1946); *see also id.* at 622 ("Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations . . . ."). Because criminal defendants cannot, consistent with fair warning, be convicted unless their conduct is "'plainly and unmistakably' within the provisions of some statute" or regulation, *United States v. Gradwell*, 243 U.S. 476, 485 (1917), courts must resolve ambiguities in their favor – not in favor of agencies' expansive policymaking initiatives.

Second, applying *Chevron* deference in criminal cases is inconsistent with a further rationale underlying the rule of strict construction: because of the seriousness of criminal penalties, and because criminal punishment represents the "moral condemnation of the community," defining criminal activity should remain within the province of the legislature. *Bass*, 404 U.S. at 348. *Chevron* deference allows agency policy judgments, rather than the language of the statute as written by Congress, or the language of the regulation as written by an agency pursuant to a proper delegation of authority, to determine what conduct merits

criminal sanction. And the Corps has no special expertise in determining which types of conduct should be punishable by criminal sanctions.

Given the substantial loss of liberty at stake for defendants charged with criminal violations of the CWA, deference to the Corps is inappropriate. Nothing in *Chevron* or its progeny indicates an intention to depart from the rules of statutory construction that have long applied in the criminal arena.

2. Accordingly, *Chevron* Deference is Also Inappropriate in Civil Clean Water Act Cases.

Theoretically, courts could use different rules of construction to interpret the same statutory provisions in different contexts. That is, in a criminal case, courts could potentially apply the rule of strict construction when interpreting a statute, while applying *Chevron* deference to an agency's construction of the same statute in a non-criminal matter. And, if a statute is relatively free of ambiguity, the choice might not matter, as both interpretive principles might yield the same result. The Clean Water Act, however, is notoriously ambiguous, and has been variously described as a "poorly drafted and astonishingly imprecise statute"[3] that is "difficult to understand, construe and apply"[4] and "devoid of plain meaning."[5] In CWA cases, then, allowing the context of the case to determine

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[3] *E.I. DuPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd in part and rev'd in part*, 430 U.S. 112 (1977).

[4] *American Petroleum Inst. v. Environmental Protection Agency*, 540 F.2d 1023, 1027 (10th Cir. 1976).

[5] *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620, 627 (2d Cir. 1976).

whether *Chevron* deference is applied would inevitably lead to inconsistent interpretations of the same statutory provisions.

The need to construe a given term consistently, however, compels the conclusion that no deference is owed to agency interpretations of criminal statutes such as the CWA, regardless of the context of the case. This result follows from this Court's decision in *Federal Communications Comm'n v. American Broad. Co., Inc.*, 347 U.S. 284 (1954), which involved a facial challenge to an FCC regulation governing broadcasting licenses. The Court held that, in promulgating a regulation that would withhold licenses from stations that broadcast lotteries of a type prohibited by § 1304 of the criminal code, the FCC had interpreted the criminal provision too broadly.

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. . . . [I]t would do violence to the well-established principle that penal statutes are to be construed strictly.

American Broad. Co., 347 U.S. at 296.

More recently, this Court has confirmed that particular care is required when resolving ambiguities in statutes containing dual civil/criminal enforcement schemes, because an interpretation arrived at in a civil setting may implicate criminal enforcement of the statute:

> After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the [statute] has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.

United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992). *See also Crandon v. United States*, 494 U.S. 152, 158-60 (1990) (finding it appropriate to apply, in a civil case, the rule of lenity in resolving any ambiguity in the ambit of a criminal statute's coverage).[6]

The Court should use this opportunity to reject squarely the dicta by Justice Douglas in *United States v. Standard Oil Co.*, 384 U.S. 224, 225-26 (1966), suggesting that the rule of lenity does not apply to the interpretation of "pollution" statutes. *Id.* ("whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history" when construing the Rivers and Harbors Act). Lower federal courts have cited *Standard Oil* to approve exceedingly broad interpretations of – and unlimited federal jurisdiction under – the CWA in both criminal and civil cases. *See, e.g., United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (as regards water pollution statutes, "the strict construction rule applicable to

[6] And, unlike *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), no long-standing agency regulation promulgated under the formal rulemaking provisions of the Administrative Procedure Act is at issue.

criminal statutes has clearly been modified by the Supreme Court"); *United States v. Hamel*, 551 F.2d 107, 112-13 (6th Cir. 1977) ("it is the rule of *Standard Oil* . . . [that water pollution legislation] be given a generous" rather than a strict construction).

Justice Harlan, in his dissent in *Standard Oil*, 384 U.S. at 236, forcefully rebutted the majority's suggestion that strict construction was not required in reading a criminal statute, simply because it concerned the subject of water pollution. *Id.* (Harlan, J., dissenting) ("The policy [of the rule of lenity] . . . is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand."). Justice Harlan's position is most consistent with this Court's recent holdings in *Thompson Center/Arms* and *Crandon*, which establish that deference to an agency's expansive statutory or regulatory interpretations is misplaced when a criminal statute is at issue. *Cf. Crandon*, 494 U.S. at 160 ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

The requirement of careful, narrow construction of criminal statutes is particularly appropriate as applied to the CWA, given the tremendous range of activity purportedly regulated by the Act. Indeed, while "[m]ost statutes permit anything except what is prohibited, [the CWA] prohibits all regulated conduct involving waters and wetlands except what is permitted." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting from order rejecting suggestion for rehearing en banc). And because innocuous substances such as rock, hot water, and sand are classified as "pollutants" by the Act, see 33 U.S.C. § 1362(6),

ordinary, productive, otherwise-innocent conduct falls within the CWA's purported coverage. The need for fair warning is thus especially strong since casual, day-to-day activities can result in severe criminal sanctions.

Because the Act has severe "criminal applications that carry no additional requirement of willfulness," *Thompson/Center Arms*, 504 U.S. at 517, strict construction of statutory and regulatory ambiguities is required. There is no place here for *Chevron*; no place here for deference.

II. The Government's Limitless View of the Corps' Regulatory Jurisdiction Should be Rejected.

While recognizing in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), that "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term" may be subject to federal regulation under the Clean Water Act, *id.* at 133 (emphasis added), this Court twice pointedly declined to endorse the Corps' assertion of regulatory authority over "all" intrastate waters, *id.* at 124 n.2 & 131-32 n.8. The waters at issue in that case were "river-side," *i.e.*, situated immediately next to a navigable waterway, *i.e.*, "actually abut[ting] . . . a navigable waterway." *Id.* at 135. Nothing in *Riverside Bayview* stands for the proposition that the Corps has the authority to regulate every intermittent stream, swale, drainage flow, and wetland in the nation.

Nonetheless, in the fifteen years since *Riverside Bayview*, the government steadfastly has attempted to expand its authority under the CWA into a mandate to regulate every drop of water in the country. Seizing on the undefined statutory phrase "waters of the United States" (which in turn defines the phrase "navigable waters"), the Corps consistently asserts its jurisdiction to the fullest –

and beyond. As the history of the *Wilson* prosecution illustrates, the government will not recognize or concede *any* limits on the Corps' (or EPA's) jurisdiction under the CWA.

A. The Corps Has Attempted to Regulate All Waters Anywhere.

1. The Corps' Position Prior to *Wilson*: Regulation of All Waters, Under the Migratory Bird Rule.

In every circuit save the Fourth, the Corps purports to regulate isolated waters of the type at issue both in *Wilson* and in the present appeal based on the possibility that migratory birds crossing state lines might visit them. *See, e.g., Leslie Salt Co. v. United States*, 55 F.3d 1388, 1390-92 (9th Cir. 1995). As the government itself has conceded, the "migratory bird rule" purports to allow federal regulation of any body of water – or even puddle – where a well-traveled bird might choose to alight. *See Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 961 F.2d 1310, 1321 n.9, *reh'g granted, order vacated*, 975 F.2d 1554 (7th Cir. 1992). This assertion of jurisdiction is boundless, and would stretch the CWA to cover virtually every piece of property in the country.[7]

In *Wilson*, however, the government could not assert jurisdiction over the properties based on the actual or

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[7] *See, e.g.*, J. Blanding Holman, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 197 (1995) ("[M]igratory flyways cover the entire United States and, as birdwatchers will attest, migratory birds will alight almost anywhere. Thus the migratory bird rule . . . operates as a limiter-manque – a limiting rule with no limits.").

potential presence of migratory birds. Prior to Mr. Wilson's indictment, the Fourth Circuit in *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988), *aff'd*, 885 F.2d 866, 1989 WL 106990 (4th Cir. 1989), rebuffed the government's reliance on the 1985 internal Corps memorandum that first asserted this dubious theory of jurisdiction. The Fourth Circuit found the memorandum to be a substantive rule that should have been promulgated in accordance with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. *See Tabb Lakes*, 1989 WL 106990 at *2.

Soon after the *Tabb Lakes* ruling, the Corps and EPA issued a joint memorandum, which pronounced the decision "incorrect" and expressly instructed their personnel not to obey the ruling outside the Fourth Circuit. *See Clean Water Act Section 404 Jurisdiction Over Isolated Waters In Light of Tabb Lakes v. United States* (Jan. 24, 1990). The memorandum further instructed Corps and EPA officials *within* the Fourth Circuit to continue to assert jurisdiction over isolated wetlands, but not to base such jurisdiction on the migratory bird memorandum. *See id.* In other words, the Corps simply ignored the *Tabb Lakes* ruling, and carried on with its practice of regulating all waters everywhere. This became unmistakably evident during the *Wilson* prosecution.

2. The Corps' Position During *Wilson*: Regulation of All Waters, Under the "All Other Waters" Drainage Theory.

Although located miles from the nearest navigable water, the government argued that the properties at issue in *Wilson* were subject to federal regulation because they form part of the "drainage pattern" in the region: any surface moisture on the parcels "eventually" drains into

"intermittent streams,"[8] which in turn "eventually" drain into two non-navigable creeks, which in turn "eventually" connect with the "headwaters" of the Potomac River. At trial, one government witness – a Corps employee – testified that federal jurisdiction under the Act covers all upstream waters "to the tip of the drainage." He explained that because St. Charles, Maryland, has an average elevation of more than 200 feet above sea level, "all the water runs downhill . . . leaves the site and goes down the streams." In the prosecutor's words: "It's all in the drainage. . . . [I]t's all in the drainage, it all drains downward. . . . It's all heading down to the Potomac."

Regulation of the *Wilson* parcels was thus grounded on the assertion that a sporadic water flow in a drainage watershed – however tiny, however intermittent, and however remote from a navigable waterway – is sufficient to establish federal jurisdiction. The government went so far at trial as to assert jurisdiction merely because *rainfall* landed on the properties: "It's true, is it not, [that] . . . water that falls on these areas is going to eventually drain into either the system that goes to Port Tobacco Creek or into the system that goes to Piney Branch?"; "What is rainfall when it hits the ground but surface water?".

The prosecution offered no evidence that the allegedly illegal CWA discharges (*i.e.*, the addition of dirt) actually affected navigable waters or interstate commerce in any way. Instead, the government's "proof" of an interstate commerce "effect" consisted of generalized speculation that conduct similar to Mr. Wilson's might have some remote impact upon beavers and rockfish that could potentially travel in interstate commerce. To this end, a

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[8] The water flow in so-called "intermittent streams" disappears entirely for long portions of the year.

"fur-bearing expert" testified at trial that 48 beavers were trapped in all Charles County in 1990 and 1991 (but none on Mr. Wilson's properties); that beaver pelts are shipped out of Maryland for processing; and that there is a market for muskrat and raccoon meat. Similarly, a "rockfish expert" told the jury that increased sediment and nutrients downstream might affect the supply of aquatic creatures eaten by rockfish in larger bodies of water, before the rockfish travel to even larger bodies of water where they are sometimes caught by out-of-state fishermen and sold to out-of-state consumers. The government also presented testimony that tadpoles, beavers, fox tracks, crayfish - and at least one swimming muskrat - were present on the *Wilson* parcels. The prosecution made no attempt, however, to prove that Mr. Wilson's actions actually affected beavers or rockfish - or water - in any way whatsoever, or otherwise caused any adverse environmental impacts.

The conception of federal jurisdiction espoused by the government in *Wilson* is thus without bounds. Under this view, every drop of surface water anywhere becomes a federal water - because rain falls everywhere, and virtually every area above sea level eventually drains to something that ultimately finds its way to a navigable water. *See Mossburg v. Montgomery County*, 666 A.2d 1253, 1259 & n.5 (Md. App. 1995) (all surface water in Maryland eventually drains into the Chesapeake Bay, Atlantic Ocean, or Gulf of Mexico). Indeed, pursuant to this theory, the Corps has previously claimed to regulate over 27,800 miles of "headwaters streams" in Maryland alone, as well as every water and wetland anywhere near such "headwaters," "intermittent streams," and "drainage areas." *1995 Wetlands Delineation Field Evaluation Form (Maryland)* (June 1995). And, under the government's tadpole/fox tracks/crayfish approach to the Commerce

Clause, all property everywhere is subject to federal regulation because animal life is ubiquitous.

On appeal the Fourth Circuit flatly rejected the "drainage pattern" theory of jurisdiction. *See Wilson*, 133 F.3d at 256-57. The court of appeals recognized that "[t]he government [had] demonstrated that water from these lands flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay." *Id.* at 254-55. The Fourth Circuit concluded, however, that this daisy-chain situation was far from adequate to establish federal jurisdiction. Rather, the "waters of the United States" would include only those waters which, "if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257. Thus, because the Corps' "other waters" regulation, 33 C.F.R. § 328.3(a)(3), defined "waters of the United States" to include intrastate waters having nothing to do with navigable or interstate waters (*e.g.*, headwaters, intermittent streams, creeks, etc.), the court of appeals declared the regulation invalid. *Id.*

3. The Corps' Position After *Wilson*: Regulation of All Waters, Under the "Tributaries" Theory.

The government's response to the *Wilson* decision was similar to its strategy after *Tabb Lakes*. Neither the Department of Justice nor the Corps sought to clarify or overturn the Fourth Circuit's opinion by seeking either en banc consideration or review from this Court. Instead, the government took the position that even after *Wilson* it could continue to regulate all waters both outside and within the Fourth Circuit.

To this end, in May 1998 the Corps and EPA issued a document providing "guidance" on the effect (or non-

effect) that *Wilson* would have on their assertion of federal jurisdiction under the CWA. *See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998, as revised June 2, 1998) ("Guidance"). To begin with, the agencies announced their intention not to follow the *Wilson* holding outside the jurisdiction of the Fourth Circuit. *See id.* at 2 ("The Fourth's Circuit's decision in the *Wilson* case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit."). Then, the agencies adopted a business-as-usual posture even *within* the Fourth Circuit. Despite the clear holding in *Wilson*, the Guidance essentially reenacts the limitless "[a]ll other waters" drainage theory of jurisdiction under 33 C.F.R. § 328.3(a)(3) under the guise of regulating "tributaries" under section 328.3(a)(5). Specifically, the federal agencies now purport to regulate "any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a *tributary system* of traditional navigable waters or interstate waters." *Id.* at 3 (emphasis added); *see also id.* at 4 (purporting to regulate "an aquatic area as part of a tributary system"); *id.* (noting that "[t]hese principles apply whether a portion of the tributary system is *intermittent* or perennial") (emphasis added).

By purporting to regulate "tributary systems" under the Guidance, "whether [or not] a portion of the tributary system is intermittent," the government continues to assert jurisdiction over tributaries of tributaries, and tributaries of tributaries of tributaries, *ad infinitum* – even as these so-called "tributaries" become tiny, intermittent streams. As a practical matter, this theory of jurisdiction, if valid, would again result in federal control over all water anywhere, because virtually all water in the country eventually becomes part of some drainage watershed (or

"tributary system"). *See Mossburg*, 666 A.2d at 1259 & n.5. But again, this limitless theory of jurisdiction is precisely the approach rejected by the Court of Appeals in *Wilson*.

The Corps has thus demonstrated its unwillingness to honor judicial constraints placed upon its authority. The agency has declined to identify the boundaries of federal jurisdiction consistent with the *Wilson* decision and the text of the CWA itself. Rather, by employing various regulatory schemes, all of which espouse a theory of jurisdiction that is without bounds, the Corps has revealed its intent to regulate all waters anywhere. This Court should flatly reject the scheme at issue here, "the migratory bird rule," as well as the Corps' limitless theory of jurisdiction under the CWA.

B. This Court Should Adopt the Fourth Circuit's Construction of Clean Water Act Jurisdiction.

In rejecting the Corps' "other waters" regulation, 33 C.F.R. § 328.3(a)(3), the Fourth Circuit explained that as a matter of statutory construction, the CWA regulates only "waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Wilson*, 133 F.3d at 257. This construction of the Act's jurisdictional reach is sound and should be followed here. And because the Corps' overly broad interpretation of the CWA exponentially expands the number of individuals potentially subject to criminal prosecution, adoption of the Fourth Circuit's construction of the Act is particularly important.

First, this construction follows naturally from the language of the statute itself, which expressly regulates the discharge of certain materials into "navigable waters," defined to be the "waters of the United States." 33 U.S.C. § 1362(7) & (12). The migratory bird rule impermissibly

treats the phrase "navigable waters" as mere surplusage, see *Bailey v. United States*, 516 U.S. 137, 145-46 (1995), and thereby fails to draw any line limiting federal authority.

Second, the Fourth Circuit's construction of the CWA is consistent with other statutes using the same language, such as the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (regulating any "navigable water of the United States"); § 403 (regulating every "navigable river, or other water of the United States"), and the Federal Power Act, 16 U.S.C. § 796(8) (similar). Because Congress and the courts for decades have interpreted these terms to refer only to actual navigable waters and their immediate tributaries as used in interstate navigational commerce, there is no reason to conclude that Congress intended in the CWA to sweep within the federal embrace all heretofore-unregulated intrastate waters and wetlands. *See Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939) ("[W]here words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary.").

Third, the Fourth Circuit's statutory construction of the jurisdictional reach of the CWA is consistent with this Court's intimation in *Riverside Bayview* as to where the line between federal and non-federal waters might be drawn: "the waters of the United States" can be said to include navigable waters and their immediate tributaries as used in interstate navigational commerce, as well as "some" waters "*inseparably bound up*" therewith. 474 U.S. at 134 (emphasis added).

Fourth, the Fourth Circuit's CWA construction is consistent with the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404

U.S. at 349. If federal jurisdiction under the CWA is completely untied from the concept of navigability, two traditionally local functions - the regulation of land use and the regulation of local water bodies - would become federalized. But in the absence of "clear and explicit language," it cannot be assumed that Congress intended to "supersede entirely the authority which the states . . . have in such matters." *Cummings v. Chicago*, 188 U.S. 410, 430 (1903) (rejecting a contention that the Rivers and Harbors Act reached wholly intrastate waters).

Finally, by adopting this construction of the Act, the Court can avoid the serious constitutional issue that would arise under the Commerce Clause if it were to accept the Corps' limitless conception of CWA jurisdiction. *See Jones v. United States*, 120 S.Ct. 1904, 1911-12 (2000); *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *cf. United States v. Lopez*, 514 U.S. 549, 564 (1995) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

CONCLUSION

The Clean Water Act does not supply the federal government with authority to regulate all waters in the country, but rather bestows federal jurisdiction only over "navigable waters." The migratory bird rule utterly ignores the concept of navigability, and thereby fails to draw any line limiting federal authority. Particularly because the CWA is a criminal statute frequently applied to impose criminal penalties, such limitless reach, grounded on *Chevron* deference, cannot be reconciled with fair

warning and due process. The decision of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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In the
Supreme Court of the ~~United States~~

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner*,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, RANDY PETERSON, AND CALIFORNIA CATTLEMEN'S ASSOCIATION IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), Randy Peterson, and California Cattlemen's Association respectfully submit this brief amicus curiae in support of the Petitioners.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. These consent letters have been lodged with the Clerk of this Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the Commerce Clause and administrative agency power. For example, PLF participated as amicus curiae before this Court in *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Jones v. United States*, 120 S. Ct. 1904 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995). PLF filed a brief amicus curiae supporting the Petitioner's Petition for Writ of Certiorari in this case.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Petitioner by further elucidating the inherent limitations on Congress' Article I authority under the Constitution, and by providing additional background on the regulatory scheme under which the Respondent federal agency is operating. PLF believes its public policy perspective and litigation experience will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in evaluating the merits of this case.

Amicus Randy Peterson owns land in West Valley City, Utah, a suburb of Salt Lake City. Although there is no surface water evident on the land, the Army Corps of Engineers asserted that the lands were "wetlands," basing their determination upon the saturation of soil below the surface for a period of 12% of the growing season, which, in this Utah location, amounts to roughly 2-3 weeks of the year. The Corps asserted jurisdiction based upon the migratory bird rule.

Mr. Peterson has asked the Corps how it made its jurisdictional determination, pointing out that any "wetlands" on his property were isolated and, therefore, not subject to the Corps' jurisdiction under *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Rather than explain the basis of the Corps' jurisdiction, a Corps supervisor responded by warning him that they would take legal action if he attempted to proceed with development plans without applying for a permit.

Mr. Peterson is disturbed by and opposed to the Corps' ability to exercise land use control over his property through the mere assertion of jurisdiction. He supports the Petitioners in the hope that this Court will provide much needed clarification on the scope of the Corps' authority under the Clean Water Act. Mr. Peterson believes his experience, as reflective of the experience of many landowners across the nation, will provide this Court with a viewpoint not represented by the parties to this litigation.

Amicus California Cattlemen's Association is a nonprofit corporation that was founded in 1917 to represent California's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres and contributed $1.5 billion to the state's $19.7 billion agriculture economy as recently as 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California alone.

The California Cattlemen's Association's members conduct their ranching operations on land that can include swales, ditches, vernal pools, and man-made stock ponds and watering holes. Due to California's geology, ranching land in California's central valley is often covered with "hardpan," that is, clay soils in which rainwater does not percolate through the ground, but instead stands until it evaporates. As a result, these ponds and pools are isolated; they have no surface or underground hydrologic connection to any other bodies of water, let alone rivers or lakes that traverse state lines.

Cattle ranching operations, especially small-scale operations, are often just one part of a ranch's total agribusiness operations, which can include timber and other crops. As a result, ranching operations can involve changes in land use. When such land alteration activities occur, cattlemen in California are increasingly encountering Corps personnel who assert permitting jurisdiction over these activities. This process is resulting in significant impacts on the members of the California Cattlemen's Association, including forcing them to abandon or change proposed land uses, delaying or halting economically necessary changes to their land uses, or forcing them to provide significant and costly mitigation. Because the "waters" in question are isolated, the primary grounds for jurisdiction invoked by the Corps is the migratory bird rule.

The California Cattlemen's Association believes that the Corps' assertion of jurisdiction over these private land uses

based upon the use by migratory birds of man-made watering holes or incidental swales extends the Corps jurisdiction beyond what was intended under either the Clean Water Act or the Constitution of the United States. The Association believes this Court should be aware of their members interests and cognizant of how the migratory bird rule is being applied in ruling on the merits of this case.

STATEMENT OF THE CASE

The Petitioner, Solid Waste Agency of Northern Cook County (SWANCC), is a municipal corporation made up of 23 different municipalities in Northern Cook County, Illinois. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (*SWANCC*). SWANCC was created by these municipalities to address, in a comprehensive way, the need for a safe and cost-effective means of disposing of nonhazardous waste generated by the communities within these municipalities. *Id.* at 847.

To this end, SWANCC purchased a 533-acre parcel intended to be utilized as a balefill site. *Id.* at 848. The parcel, however, had an assortment of trenches and depressions on it, reflecting the land's prior use as a strip mine. *Id.* These trenches, scattered throughout the site, make up a network of seasonal and permanent ponds. *Id.* SWANCC's original plans called for utilizing a 267-acre portion of the parcel. *Id.* Accordingly, in 1986, because the creation of the balefill site would require filling in these wet depressions, SWANCC contacted the Corps to determine whether a permit under Section 404 of the Clean Water Act was required. *Id.* The Corps inspected the site, and concluded that it had no jurisdiction. *Id.*

SWANCC, however, did not utilize its original plan but, instead, decided to proceed with a plan that would cover 414 acres of the site. *Id.* Accordingly, one year after the original inspection, SWANCC asked the Corps, again, whether

its new proposed balefill site contained any jurisdictional wetlands. *Id.* After another on-site inspection, the Corps responded in the negative. *Id.* According to the Corps, the waters on the site did not meet the regulatory definition of "wetlands." *Id.*

Shortly thereafter, however, the Illinois Nature Preserves Commission, a state agency, informed the Corps that migratory birds used the site. *Id.* As expressed by the court below, "[t]his new information made all the difference to the Corps, because of the so-called migratory bird rule." *Id.* That is, pursuant to its guidelines, the Corps asserted jurisdiction over the site because of the site's use by migratory birds. Under the agency's reckoning, migratory bird use satisfies the constitutional requirement that the federal government may only reach activities that substantially affect interstate commerce because people spend millions of dollars every year hunting and observing migratory birds. *Id.* at 850.

Based on the Corps' assertion of jurisdiction, SWANCC applied for a Section 404 permit. *Id.* at 849. The Corps denied it. *Id.* A revised permit application was also denied. *Id.* Subsequently, SWANCC filed this action in federal court challenging the Corps' jurisdiction. SWANCC contended that migratory bird use was insufficient to establish federal commerce jurisdiction over an isolated wetland. *Id.* The district court, following circuit precedent, ruled in favor of the Corps. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946, 951-52 (N.D. Ill. 1998) (*Solid Waste*). The Seventh Circuit Court of Appeals affirmed. *SWANCC*, 191 F.3d at 847. This Court granted SWANCC's petition for writ of certiorari to resolve whether the Corps' jurisdiction comports with the Clean Water Act and with the Commerce Clause. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 120 S. Ct. 2003 (2000).

SUMMARY OF ARGUMENT

The migratory bird rule is a jurisdictional rule employed by the Corps to reach isolated intrastate bodies of water under the Clean Water Act. The basic premise of the rule is that, regardless of the character, use, or origin of the body of water in question, the Corps may regulate it as a "water of the United States" solely based upon its use by migratory birds.

Because the rule does not attempt to define itself by reference to the statutory term "navigable waters . . . of the United States," the migratory bird rule is an unreasonable interpretation of the Corp's jurisdiction under the Act. By fashioning this extra-regulatory test to assert jurisdiction over land uses where connections to interstate commerce are, at best, extremely tenuous, the Corps has arrogated to itself the power to regulate virtually any land uses it chooses, and for reasons unrelated to the pollution control purposes which were the impetus behind the Clean Water Act. While Congress understood and intended that implementation of the Clean Water Act would serve broad environmental goals, the Corps may not use this broad intent to expand its jurisdiction beyond the specific terms set forth in the Act—to regulate the "navigable waters . . . of the United States."

The migratory bird rule is also unreasonable because it construes federal power beyond that allowed under the Commerce Clause. Use of waters by migratory birds does not make the filling of those waters an activity that "substantially affects" interstate commerce within the meaning of this Court's precedents. In particular, the use of the aggregation principle, by which the government determines "substantial effects" by aggregating activities that have minimal impacts on interstate commerce, does not apply to noneconomic activities. Further, the activity here—the filling of waters used by migratory birds—has such an attenuated link to any interstate commerce impacts that upholding the migratory bird rule as a valid

interpretation of the commerce power would be tantamount to sanctioning a federal police power without limits.

Finally, violations of the Clean Water Act carry with them significant penalties, both civil and criminal. Where the violation of a law has such significant impacts on individuals, it is unconscionable that the Corps may use vague jurisdictional grounds like the migratory bird rule to exercise permitting authority over private land use activities. By avoiding fixed and verifiable standards as the basis for its jurisdiction, the Corps has an almost unfettered ability to make unilateral decisions about its own jurisdiction, thereby subjecting landowners to arbitrary and discriminatory enforcement.

For these reasons, Amici respectfully submit that the migratory bird rule is invalid.

ARGUMENT

I

THE MIGRATORY BIRD RULE DOES NOT COMPORT WITH THE CLEAN WATER ACT BECAUSE IT IS AN UNREASONABLE INTERPRETATION OF THE TERMS "NAVIGABLE WATERS" AND "WATERS OF THE UNITED STATES"

A. The Migratory Bird Rule Allows the Corps to Exercise Jurisdiction over Virtually Any Waters Whatsoever

The Clean Water Act was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the means by which Congress sought to achieve this purpose was through regulating the discharge of pollutants into bodies of water. Consequently, under the Act, an individual must apply for a

permit, commonly referred to as a Section 404 permit, from the Army Corps of Engineers "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). The term "navigable waters" is defined by statute: "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

In 1985, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court addressed the question whether the statutory terms "navigable waters" and "waters of the United States" properly encompassed within them wetlands adjacent to navigable bodies of water and their tributaries. *Id.* at 123. In resolving that question in the affirmative, this Court specifically withheld expressing an opinion on whether the statute empowered the Corps to regulate wetlands not adjacent to open bodies of water—that is, isolated wetlands. *Id.* at 131 n.8. This case requires this Court to address the question left open in *Riverside Bayview*; specifically, whether the Corps' jurisdiction under the Clean Water Act extends to wetlands or other waters not connected to navigable bodies of water or their tributaries, and, more specifically, whether the Corps may do so under the so-called "migratory bird rule." In order to resolve that question, it is important to understand what the migratory bird rule is, and from where it derives.

Although the Assistant Solicitor General alluded to the migratory bird rule during oral argument in *United States v. Riverside Bayview Homes, Inc.*, No. 84-701, 1985 U.S. Trans. LEXIS 25, at *18-*19 (Oct. 16, 1985), the rule did not appear as an official Corps policy until 1986, when the Corps recodified its jurisdictional regulations in the Federal Register. *SWANCC*, 191 F.3d at 852. The gist of the rule, as cast by the court below, is that use of any water by migratory birds renders that water subject to federal regulation under the Commerce Clause because people spend millions of dollars every year hunting and observing migratory birds, including crossing state lines to do so, and that, therefore, destruction of bird habitat, in

the aggregate, "substantially affects" interstate commerce within the meaning of this Court's decision in *United States v. Lopez*. *SWANCC*, 191 F.3d at 850.

Technically, the migratory bird rule is not a "rule" at all, in that it has not been formally adopted as a regulation. *Id.* It has been found, instead, to be an "interpretive" guideline describing one means by which the Corps can assert jurisdiction under its "other waters" regulation. *Id.* *But see Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd without opinion*, 885 F.2d 866 (4th Cir. 1989) (finding that the migratory bird rule was a substantive rule, and that the Corps had violated the APA by promulgating it without complying with notice and comment requirements). The "other waters" regulation is one provision of the Corps' jurisdictional regulation, codified at 33 C.F.R. § 328.3. The "other waters" regulation purports to grant the Corps regulatory jurisdiction over:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

33 C.F.R. § 328.3(a)(3).

The regulation itself contains no language referencing the migratory bird rule. However, in the Federal Register notice announcing the rule, the Corps explained that the inclusion of any waters "which could affect interstate or foreign commerce" effected a broader reach than what appeared on the face of the regulation:

> EPA has clarified that waters of the United States at 40 C.F.R. 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,206, 41,217 (1986). Thus, the migratory bird rule does not limit itself to waters used by migratory birds, but to waters that potentially serve as habitat for birds or other wildlife, or that might be used for some other purpose that impacts interstate commerce.

In the Corps' 1988 revision to its rules, it further explained its jurisdiction under the migratory bird rule by citing to an internal memorandum from EPA's general counsel addressing the question of whether Clean Water Act jurisdiction required actual connections to interstate commerce, or were satisfied merely by potential use, including potential use by migratory birds or other wildlife. The memorandum stated:

> In simplified terms, the answer is that if the evidence reasonably shows that the waters "are used or would be used" by migratory birds or endangered species,

> it is covered by EPA's regulation. . . . In addition, if a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds, it would also seem to fall clearly within the definition . . . .

Memorandum from Francis S. Blake to Richard E. Sanderson of Sept. 12, 1985. Thus, despite the holding of the Court below that the regulation only reaches actual migratory bird habitat (that is, where a bird species "naturally lives or grows"), *SWANCC*, 191 F.3d at 850, the Corps construes its Clean Water Act jurisdiction more broadly. For example, in a case called *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), the EPA asserted Clean Water Act jurisdiction not on a finding that a sinkhole used by Laguna Gatuna for industrial wastewater served as bird habitat, but on the sole finding that dead migratory birds were found near the sinkhole. *Id.* at 565.

Further, the Corps is not limited by the "other waters" regulation to ponds or wetlands or any of the other categories of "waters" spelled out in its "other waters" regulation when asserting jurisdiction under the migratory bird rule. For example, in the present case, the Corps concluded that SWANCC's property did not contain wetlands, natural ponds, sloughs, prairie potholes, lakes or any of the "other waters" delineated in the regulation. The Corps had its own agents carry out on-site inspections on SWANCC's property on two separate occasions, and these agents specifically found that the man-made ditches on the property did not constitute "wetlands" within the Corps' *regulatory* definition of the term. *SWANCC*, 191 F.3d at 848. But the Corps found jurisdiction anyway, based upon the "catch-all" language of the "other waters" regulation, specifically, "[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). Thus, the

migratory bird rule is not simply a means by which the Corps asserts jurisdiction over instrastate wetlands, lakes, or other ecologically significant or natural bodies of water; rather, it is the jurisdictional test the Corps employs to reach waters of any nature. As the Corps explained in its 1986 Federal Register notice:

> For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." *However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."*
>
> (a) Non-tidal drainage and irrigation ditches excavated on dry land.
>
> (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
>
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. at 41,217 (emphasis added); *see also Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) (upholding Corps' ability to exercise jurisdiction over artificially created waters used by migrating birds—in that case, salt crystallization pits—in accord with this language).

Thus, the "other waters" rule is just that—a regulation that purports to grant the Corps jurisdiction over any other water whatsoever, so long as the Corps can identify some link between that water and interstate commerce. Indeed, at oral argument in *Riverside Bayview*, when a member of this Court surmised that a man watering his back yard a lot would not be subject to the Clean Water Act, the Assistant Solicitor General responded:

> Unless we could show that he has got some interstate commerce activity going on in his back yard, and the Corps would take it upon itself to make that showing itself, and not require the back yard owner to come in and demonstrate it, the absence of the commerce connection to the Corps's satisfaction.

United States v. Riverside Bayview Homes, Inc., 1985 U.S. Trans. LEXIS 25, at *14.

As a result, the migratory bird rule, as an interpretation of the "other waters" regulation, allows the Corps to regulate *any type* of water—and all manner of local and private land uses—so long as the Corps can show that migratory birds use such waters. Given the fact that the United States is home to some 2.5 to 6 billion birds, two-thirds of which migrate, John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. Davis L. Rev.

1237, 1241 (1995), it is hard to imagine what waters the Corps cannot reach through the migratory bird rule.

B. "Navigable Waters" and "Waters of the United States" Cannot Reasonably Bear the Interpretation Given to These Terms by the Corps by Which Bird Use, Alone, Renders Waters "Waters of the United States"

As stated above, the Clean Water Act gives the Army Corps of Engineers permitting authority over discharges into the "navigable waters," defined by statute as "waters of the United States." 33 U.S.C. §§ 1344, 1362. The Petitioners have comprehensively argued that these terms were intended by Congress to relate to a specific category of waters. Moreover, even granting that these terms may be sufficiently ambiguous to allow some degree of agency interpretation, the Corps has patently failed to resolve the ambiguity in a manner that comports with the intent of the statutory language.

In *Riverside Bayview*, this Court held that the Clean Water Act was intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133. But it does not follow from this holding that the Corps may ignore the statutory language, and the intent behind it, in construing the scope of its jurisdiction and, further, that the Corps can regulate such waters for purposes unrelated to the overriding purpose of the Clean Water Act, which is to protect the Nation's waterways from the deleterious effects of pollution. *See* 33 U.S.C. § 1251(a)(1)-(7).

However, this is precisely how the Corp's jurisdiction has come to be understood. As the Seventh Circuit cast the issue, the statutory terms "navigable waters" and "waters of the United States" do not have any particular relevance in defining the scope of the Corps' jurisdiction. Instead, the Corps may simply "reach[] as many waters as the Commerce Clause allows," *SWANCC*, 191 F.3d at 851, and, further, may regulate

those waters for any purpose related to "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," *id.* at 852 (citing 33 U.S.C. § 1251(a)). Indeed, in this case, the Corps denied SWANCC's permit not because it would result in pollution of the nation's waterways, but based on the more amorphous "public interest" standards enunciated in 33 C.F.R. § 320.4, *see* Brief for the Petitioner at 9-10 (citing Administrative Record at 15,658-59), which includes the assessment of factors such as aesthetics, historical value, recreation, safety, food and fiber production, "considerations of property ownership and, in general, the needs and welfare of the people," in addition to considerations more apropos to environmental regulation. 33 C.F.R. § 320.4(a)(1). While one may not fault, in general, the agency's ability to exercise discretion in carrying out its statutory mandate to protect the interests that the Clean Water Act was enacted to remedy, it is another thing entirely to treat the broad interests enunciated in the preamble to the Act as defining the jurisdictional grant of authority to the Corps.

> A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. . . . The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (footnote omitted).

The Clean Water Act confers on the Corps the authority to regulate "navigable waters . . . of the United States"—and all that may imply—but not anything else. But here, the Corps has not given sufficient consideration to what Congress intended by its statutory language—or rather, has construed legislative intent from a selective reading of the legislative history.

However broad the term "waters" may be, the Corps cannot get around the underlying premise that,

> "Waters *of the United States*" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.)

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (emphasis in original). Indeed, the Fourth Circuit had little trouble in finding that the statutory language had to have some relevance in construing the reach of the Corps' authority. In striking down the Corps' "other waters" regulation as *ultra vires*, that court concluded:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters could affect interstate commerce. . . . When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997). In short, the Fourth Circuit held, consistent with the precept that courts must give effect to every word in a statute, *see* Norman J. Singer, Sutherland Statutory Construction, § 46:06 (2000); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), that the Corps was not free to define the statutory language any way it pleased in construing its own jurisdiction under the Act.

Even Congress, in acknowledging that the phrase "navigable waters of the United States" should "be given the

broadest constitutional interpretation," *Senate Consideration of the Report of the Conference Committee, October 4, 1972*, 93rd Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, Committee Print (January 1973) at 173, understood the term "waters of the United States" as having a distinct meaning:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact when the form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. *In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.*

Id. (emphasis added). *See also* Conference Report, House Debate, Committee Print (January 1973), at 250 (citation omitted) ("The 'gist of the Federal test' is the waterway's use 'as a highway,' not whether it is 'a part of a navigable interstate or international commercial highway.'"). Thus, the Corps' attempt to read the definitional phrase "waters of the United States" as being an open-ended license to define waters any way they chose is insupportable.

Indeed, in *Riverside Bayview*, this Court's holding that the Clean Water Act reached wetlands adjacent to navigable waterways was premised on the principle that the starting point for construing the Corps' jurisdiction was the notion that, though the Clean Water Act itself allowed the Corps to regulate waters that were not themselves navigable, the Act was directed

at the specified class of waters that were an appropriate focus of federal regulation. This Court reasoned:

> We cannot say that the Corps' conclusion that adjacent wetlands are *inseparably bound up with the "waters" of the United States*—based as it is on the Corps' and EPA's technical expertise—is unreasonable.

Riverside Bayview, 474 U.S. at 134. By stating the issue in this manner, this Court expressly acknowledged that the "adjacent wetlands" rule was based upon the notion that the "point at which water ends and land begins," *id.* at 132, is necessarily a technical one, and that therefore the Corps' expert determination that adjacent wetlands were "inseparably bound up" with the "waters of the United States" rendered adjacent wetlands, in fact, part of the "waters of the United States" subject to the Act.

But unlike the adjacent wetlands at issue in *Riverside Bayview*, there is no confusion on the point that the migratory bird rule reaches not only waters that are not "navigable in fact," but small, isolated waters like ponds or watering holes completely contained within a private parcel of land. Indeed, by definition, the migratory bird rule is employed precisely to reach those waters that the Corps cannot otherwise reach through its more traditional test of linking a given water body to an interstate waterway. *See United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1320 (6th Cir. 1974) (construing Clean Water Act to reach a creek that was a tributary of another creek that was a tributary of a river that was a tributary of a navigable river). Rather, the migratory bird rule is more typically used to reach an isolated puddle in the middle of a farmer's field. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 1999 U.S. Dist. LEXIS 21,389, at *43-44 (E.D. Cal. 1999).

Thus, while the term "waters of the United States" may be sufficiently ambiguous to allow the Corps some "wiggle" room in its interpretation, *see Riverside Bayview*, 474 U.S. at 133, there is no basis in law or in the statute that entitles the Corps to "wiggle" itself completely out of the fact that "waters *of* the United States" is a subset of all the waters *in* the United States. Through the migratory bird rule, the Corps has "bootstrap[ped] itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Both law and logic preclude the Corps from construing the term "navigable waters . . . of the United States" to reach any waters, so long as those waters are used or could be used by migratory birds. Accordingly, this Court should find that the migratory bird rule is an unreasonable interpretation of the term "waters of the United States" in the text of the Clean Water Act.

II

THE MIGRATORY BIRD RULE IS UNREASONABLE BECAUSE IT STRETCHES FEDERAL AUTHORITY FAR BEYOND THAT ALLOWED UNDER THE COMMERCE CLAUSE

As this Court stated in *United States v. Lopez*, 514 U.S. 549 (1995), "[t]he Constitution creates a Federal Government of enumerated powers," *id.* at 552, and one of those powers is the power "to regulate commerce . . . among the several states." U.S. Const. art. I, § 8. In this case, the United States contends that the power to regulate interstate commerce encompasses within it the power to regulate isolated, instrastate bodies of water that are used by migratory birds. This is an unreasonable interpretation of the Act.

> A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.

United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1915). Because the rule, both on its face and as applied, gives rise to serious doubts as to whether the Corps is exercising its permitting authority consistent with the limits of federal power, this Court should hold the migratory bird rule invalid.

Even were this Court to construe the rule as though it were duly enacted by Congress, it is constitutionally troublesome. *See Wilson*, 133 F.3d at 257. At first blush, and perhaps the second and third, the connection between interstate commerce and the use of ponds by birds does not readily come to mind. However, the Army Corps of Engineers, with the sanction of several courts of appeals, *SWANCC*, 191 F.3d 845; *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), has ingeniously devised a connection that, it argues, supplies the requisite nexus between birds and commerce. As explained by the court below:

> "[T]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds." Statistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons. There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds

> "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

SWANCC, 191 F.3d at 850 (citations omitted). Thus, according to the Seventh Circuit and the Corps, the migratory bird rule satisfies the third *Lopez* test—that is, it is a regulation of an activity that substantially affects interstate commerce—because destruction of its habitat, in the aggregate, substantially affects interstate commerce related to the hunting and observing of migratory birds. *SWANCC*, 191 F.3d at 849-50.

While the Seventh Circuit drew its conclusion with the benefit of this Court's analysis in *Lopez*, the court misapplied it. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari). More critically, it misapplied it in a context—through aggregation—which this Court has further clarified through its subsequent decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000).

In *United States v. Lopez*, this Court struck the Gun Free School Zones Act as beyond the authority of Congress to enact under the Commerce Clause. *Lopez*, 514 U.S. at 552. In so doing, this Court noted that the act could not

> be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. Nevertheless, the court below found it sufficient that the destruction of bird habitat, in the aggregate, was sufficient to create the "substantial effects" necessary to uphold the migratory bird rule. *SWANCC*, 191 F.3d at 850.

However, in *Morrison*, this Court affirmed that the aggregation principle may not be invoked to sanction congressional action every time Congress chooses to regulate intrastate noneconomic activity. *Morrison* dealt with the constitutionality of the federal Violence Against Women Act. The provision in question gave private litigants the right to bring a federal claim against any individual who committed a "crime of violence motivated by gender." *Morrison*, 120 S. Ct. at 1747. In defending the constitutionality of the Act from a Commerce Clause challenge, the government argued that the Act regulated an activity that "substantially affected" interstate commerce because violence against women, in the aggregate, had significant effects on the economy in terms of time lost from jobs, medical costs, and other impacts. *Id.* at 1752. The Court rejected the notion that the aggregation of isolated activities was automatically sufficient to meet the requisite "substantial effects" test:

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history *our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.*

Id. at 1751 (emphasis added). Here, the Corps is regulating the fill of waters, an activity that is not, by its nature, economic. Viewed in light of *Morrison's* holding, because the destruction of waters is not inherently economic, the aggregation principle does not protect the rule.

Thus, the rule is only valid if it meets the other "substantial effects" tests, such as if the rule contains a jurisdictional element requiring that the destruction of a particular water would have impacts on interstate commerce, *Lopez*, 514 U.S. at 561, or could otherwise be sustained under

an independent analysis of substantial effects, *id.* at 562. But, again, the migratory bird rule fails.

First, the rule contains no jurisdictional element in the sense intended by *Lopez*. That is, though bird use is the "jurisdictional element" employed by the Corps, even where migratory birds in fact use a given body of water, the Corps' rule does not require any showing that the destruction of the water would impact the identified commerce in migratory bird hunting or observing. Second, under an independent analysis, this Court made it clear that a Commerce Clause rationale may not employ a method of reasoning which would admit of no limits on the commerce power. *Morrison*, 120 S. Ct. at 1752. Specifically, this Court held that the commerce power did not allow the federal government to regulate any activity, such as violence against women, that could be linked through a long causal chain to indirect and unspecified effects on interstate commerce, such as impacts on jobs and medical costs. Because virtually all human activity has similar, though attenuated, impacts on commerce, such a line of reasoning would effectively grant Congress unlimited authority to regulate any human activity, and "completely obliterate the Constitution's distinction between national and local authority." *Id.*

Like the link between violence and commerce espoused in the Violence Against Women Act, the Corps' theory of a link between interstate commerce in hunting and birdwatching and the destruction of bird habitat proves too much. *See Lopez*, 514 U.S. at 564. In *Morrison*, the regulation in question targeted only "gender-motivated" violence; consequently, there was no direct correlation between the specific regulated conduct and the supposed commerce impacts. As this Court noted, all violence, of whatever nature, had even greater impacts on the economy than the subset of violence that constitutes gender-motivated violence. *Morrison*, 120 S. Ct. at 1753. Thus, this Court reasoned, if Congress could regulate gender-motivated

violence, it could regulate all murder and all crime—a power that went far beyond what the Commerce Clause permitted. *Id.*

Similarly, any impacts on the commerce in bird hunting and watching do not directly correlate to the destruction of waters that are regulated under the migratory bird rule. If the Corps may regulate "waters" simply because they may be used by migratory birds, the Corps line of reasoning would enable Congress to regulate any land or object that is used by any animal at all, since the ownership, breeding, sale, observation, hunting, and studying of all animals surely has an even greater effect on interstate commerce than the mere use of isolated ponds by migratory birds. In short, the rationale employed by the Corps in invoking the migratory bird rule admits of no limits on the federal commerce power.

Because the migratory bird rule expands federal authority beyond that granted to the federal government under the Commerce Clause, it is an unreasonable interpretation of what Congress intended when it granted the Corps authority to regulate the "navigable waters . . . of the United States." Accordingly, this Court should hold the migratory bird rule invalid.

III

BECAUSE CLEAN WATER ACT VIOLATIONS CAN RESULT IN SIGNIFICANT PENALTIES, IT IS UNREASONABLE TO ALLOW THE CORPS TO EMPLOY THE MIGRATORY BIRD RULE TO SELECTIVELY REGULATE WHATEVER LAND USES IT DEEMS UNDESIRABLE

Violations of the Clean Water Act carry with them substantial penalties, including criminal penalties that can entail confinement and significant fines. 33 U.S.C. § 1319. And because the Act makes it unlawful to "discharge . . . dredged or fill material into the navigable waters" without a permit, 33 U.S.C. § 1344(a), criminality depends as much upon the

overt act of filling as it does on the character of the water or land in question—specifically, whether any portion of the property constitutes "waters of the United States." Consequently, it is critical that the statutory term "waters of the United States" bears a meaning that permits the Corps to reach the types of activities and individuals Congress intended to reach.

But the migratory bird rule allows the Corps to reach such a broad array of properties and waters that it is affirmatively *unhelpful* in enabling an individual to make a definitive determination as to whether or not any land he or she may own contains "waters" subject to the Corps' permitting jurisdiction. In short, the migratory bird rule, by allowing the Corps to reach not only significant waters such as lakes and rivers, but man-made ditches, *SWANCC*, 191 F.3d at 848, and abandoned pits created for industrial use, *Leslie Salt*, 896 F.2d at 359-60, even where those waters do not constitute "wetlands" within the regulatory definition of that term, *SWANCC*, 191 F.3d at 848, is an interpretation that "contains no such definite standard from which one can start in the calculation of his duty." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (Jackson, J., dissenting).

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The migratory bird rule is just the type of amorphous rule that raises serious due process problems. It allows the Corps to reach *any type* of waters solely on the basis that those waters *could be used* by migratory birds. Accordingly, because migratory birds are ubiquitous, *see* Leman, *supra*, the migratory bird rule enables the Corps to assert jurisdiction over property subject only to the subjective judgment of individual agency officials as to what lands ought or ought not to be regulated.

The purpose of rules is to ensure fair, consistent, and objective standards that enable the regulated community to understand what the law requires. *See generally*, Kenneth Culp Davis, Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (Third Ed. 1994). But rules, even unenacted ones like the migratory bird rule, are useless if they do not serve these ends. Indeed, given the Corps' expansive understanding of the waters it may regulate under the migratory bird rule, the Corps' other jurisdictional regulations relating to the definition of terms like "wetlands," 33 C.F.R. § 328(b), "tidal waters," 33 C.F.R. § 328(f) and "navigable waters" 33 C.F.R. § 329.4, for purposes of Section 404 jurisdiction, are manifestly pointless. If a landowner hires the nation's foremost hydrologists and biologists to survey the soils and flora on his property and they conclude that the property contains no wetlands, the entire exercise can be summarily negated by the predilections of a single bird that decides to have a bath. In the end, there is no avoiding the fact that, under the regime of the migratory bird rule, whether one is breaking the law depends entirely upon whether birds have, or could have, used one's property. This is a bizarre ground on which to base criminal or civil liability.

But more pragmatically, the expansive notion of jurisdiction evidenced by the migratory bird rule—that is, that any type of water at all may be regulated by the Corps—leaves the regulated community in the dark as to whether a given assertion of jurisdiction by the Corps is legitimate. As a result,

every assertion of jurisdiction must be taken as valid by landowners, because there is no verifiable standard against which they may measure legitimate versus illegitimate enforcement.

In practice, it is not unusual for landowners to receive informal "notices," informing them, with no specificity whatsoever, that the land they are developing "may" contain waters subject to Section 404 permitting jurisdiction, and that the unlawful filling of these waters can subject them to heavy fines or penalties. *See* Notice at Appendix "A." Once confronted by such a notice, landowners are unavoidably bound up in the permitting scheme, solely at the Corps' discretion. Thus, once the Corps asserts jurisdiction, a party must either risk civil or criminal prosecution, or submit to regulation. *See Laguna Gatuna*, 58 F.3d at 566. Because "potential" bird use is enough to create Corps' jurisdiction, the individual being regulated is subject entirely to the Corps' unilateral judgment as to the characterization of his land as "waters of the United States."

For example, in *Howell v. United States Army Corps of Engineers*, 794 F. Supp. 1072 (D.N.M. 1992), a plaintiff who had received a cease and desist order from the Corps challenged the assertion of jurisdiction over his property in a declaratory relief action, claiming that his land did not contain any wetlands subject to the Clean Water Act. *Id.* at 1074. In accord with settled law, the Court dismissed the case for lack of subject matter jurisdiction. *Id.* But the Court's analysis is revealing of how inherently open to abuse the Corps' regulatory process is. A letter from the Corps to the plaintiff stated:

> *We intend to conduct a wetland delineation on your property to determine in detail the extent of wetlands* initially investigated by Mr. Wood. . . .
>
> When all of the available information has been reviewed *and our wetland delineation has been*

> *completed and verified*, I will request you to apply for an after-the-fact permit . . . .

Id. at 1074 (emphasis added). In short, the Corps' issued its cease and desist order despite its admission that it had no clear knowledge of the existence or extent of wetlands on the property in question. The Court, in finding no provision in the Clean Water Act for pre-enforcement judicial review, displayed remarkable irony in concluding:

> It is clear from the cease-and-desist letter quoted above that the Corps will not finalize its decision until it conducts its "wetland delineation" and decides whether to issue a permit. *Only at that time, and perhaps not until the Corps forces compliance through penalties or judicial action, will the plaintiff know the concrete effects of the Corps' decision.*

Id. at 1074-75 (citation omitted) (emphasis added). As explained by the court, the plaintiff landowner had no recourse to judicial review of the Corps' initial unsubstantiated assertion of jurisdiction. *See also Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993). Further, whether or not his land contained "wetlands" depended solely upon what the Corps itself concluded—after-the-fact, and only by means of forcing the landowner to submit to an on-site inspection of his land by government agents: "The issue concerns factual determinations properly resolved *through agency expertise* and reviewable by this Court once a record is developed *by the agency*." *Id.* at 1075 (emphasis added). *See also United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979):

> In the course of obtaining the permit he can extract from the Corps an exact statement of where the wetlands are and protect himself from further legal proceedings. Furthermore, Byrd cannot complain of the absence of a legal description of the wetlands

> since, as the district court noted, he has refused to permit his land to be surveyed.

Id. at 1209. In short, the Corps gets to call all the shots.

This degree of regulatory power, coupled with an amorphous definition of "waters of the United States" that allows a Corps agent to legitimize the Corps' authority simply by finding that a pond "would be" used by a bird gives the Corps complete discretion to decide, unilaterally, whether a given land use activity may or may not be lawful. *See Borden Ranch*, 19 U.S. Dist. LEXIS 21,389 at *43-44 (Court agreed with Corps that a vernal pool "was or would have been inhabited" by a threatened species; therefore, the destruction of the pond affected interstate commerce.). This is an open invitation to arbitrary and discriminatory enforcement.

As a practical matter, the mere assertion of jurisdiction by the Corps becomes jurisdiction as a matter of law, because such decisions are not immediately reviewable and because the Corps is capable, through its standardless migratory bird rule, of establishing jurisdiction under the most marginal rationales which no prudent landowner can, at present, ignore at the risk of criminal or civil liability. When an administrative agency, such as the Corps, "holds all the cards" as to the implementation of a regulatory permitting program, due process demands, first, that the agency exercise only that power granted to it, and second, that it define the elements of an offense with sufficient specificity to put the public on notice. The Corps' refusal to define "waters of the United States" by reference to objective standards makes regulatory abuse not merely a possibility, but virtually guaranteed, since Corps personnel themselves are not bound by consistent rules.

Where a federal law, such as the Clean Water Act, can subject individuals to criminal and civil penalties, *see* 33 U.S.C. § 1319, it is unconscionable that a federal agency is able to implement the law in a manner that has no objective, verifiable

standards by which an individual can discern the requirements of the law. In the Clean Water Act, which has been held by some courts to be a "public welfare" statute in which violations can be criminally prosecuted in the absence of any criminal intent, *see United States v. Hanousek*, 176 F.3d. 1116 (9th Cir. 1999), *see also* 33 U.S.C. § 1319(c)(1), the possibility of arbitrary or discriminatory enforcement demands that the terms of the law be defined with a high degree of specificity.

Because liability is not merely predicated upon the overt act of filling, but on the character of the land which is being filled, it is unreasonable to sanction a definition of "waters of the United States" which bears only what meaning the Corps chooses to assign to it, and, in particular, which depends upon whether a bird uses it. The migratory bird rule is an unreasonable interpretation of the term "waters of the United States" because it is patently unreasonable to predicate criminal and civil liability upon a Corps official's subjective calculation of where a bird may choose to alight.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the decision of the court below should be REVERSED.

DATED: July, 2000.

Respectfully submitted,

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[SEAL] CORPS OF ENGINEERS
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REPLY TO
ATTENTION OF

NOTICE

The Corps of Engineers' employee delivering this notice believes your construction activities are in violation of Federal Law.

Anyone engaged in any construction activity in a waterway of the United States or adjacent wetlands must secure a Department of the Army permit before construction is initiated. If you are engaged in such construction activity, and do not have a permit, you are violating Federal Law and are subject to fines up to $50,000.00 per day of construction activity, depending on the nature of the activity. Any contractor performing work in waters of the United States or adjacent wetlands without a permit is subject to the same penalties as the landowner for whom the work is being performed.

Should you currently be engaged in unauthorized work, we recommend that you cease work. Cessation of work is an indication of a good faith attempt to comply with the law. In any event, a formal cease and desist order will be promptly issued to anyone engaged in illegal work.

If you have any questions which the employee delivering this notice cannot answer, please contact one of the following Regulatory Offices, or our Office of Counsel (916) 557-5290.

Appendix A-2

California and Nevada	Sacramento District, Corps of Engineers Regulatory Section 1325 J Street Sacramento, CA 95814-2922 Phone (916) 557-5250
Utah	Sacramento District, Corps of Engineers Utah Regulatory Office 1403 South 600 West, Suite A Bountiful, Utah 84010 Phone (801) 295-8380
Western Colorado	Sacramento District, Corps of Engineers Grand Junction Regulatory Office 400 Rood Avenue, Room 142 Grand Junction, Colorado 81501-2563 Phone: (303) 243-1199

/s/ Laurence R. Sadoff
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Colonel, CE
District Engineer

1. Section 404, Clean Water Act (33 USC 1344)

Supreme Court, U.S.
FILED
JUL 27 2000
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(23)

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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33pp

QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated, intrastate waters solely because those waters serve, or potentially could serve, as habitat for migratory birds.

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S. Ct. R. 37.6 1

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Virginia S. Albrecht & Bernard N. Goode,
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Thomas E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*,
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Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* (Ass'n of State Wetland Managers, 1994) 10, 11

Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?*, Environment,Mar. 1992 5

Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong. (1996) (statement of Robert McMackin) 6

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and business organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region of the country. As the nation's preeminent business association, the Chamber has an obvious interest in the scope of federal regulatory authority in general, and federal environmental regulation in particular.

In addition, the Chamber has extensive interests in federalism issues. The Chamber participates regularly as *amicus curiae* in this Court's federalism cases, *see, e.g., United States v. Locke*, 120 S. Ct. 1135 (2000); *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000); *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000), often in order to urge the Court to preserve intact the unfettered national and international markets envisioned by the Framers. At the same time, the Chamber has launched its Federalism Initiative, a collaborative effort of non-profit trade groups, corporations, and federal, state, and local officials, that seeks to bring into better focus a vision of the respective state and federal roles in our federalist system. The Chamber recognizes that where local authority is the best means to a careful, sensitive consideration of local needs, federal intervention may be counterproductive—a prescription for overlapping regulatory regimes, duplicative administrative requirements, and uncertainty for the regulated community.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties have given written consent to the filing of this *amicus* brief in letters that have been submitted to the clerk. *See* S. Ct. R. 37.3(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not challenge the power of federal agencies to regulate activities that cause the pollution of interstate waterways, their tributaries, or adjacent wetlands. The pollution or filling of wetlands that are connected to navigable waters undoubtedly can have significant impacts on the instrumentalities of interstate commerce (navigable waterways) and interstate commerce itself. Congress accordingly should, and does, have ample authority over these truly interstate and commercial problems.

The case instead presents the question whether the federal government may set land-use policy for 17.6 acres of hydrologically isolated wetlands, whose only connection with interstate commerce is the fact that they are actual *or potential* landing zones for migrating birds. Under the "migratory bird interpretation" of the U.S. Army Corps of Engineers ("Corps"), the answer to that question is an emphatic *yes* that puts the federal government in the leading role in land-use decisionmaking for, not just this isolated plot, but every "damp depression" in the nation. The migratory bird interpretation threatens to impose Army jurisdiction over every backyard in the United States.

This case is therefore "about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Along with separation of powers, federalism is one of the two most essential structural elements of our Constitution. Federalism's core function is to preserve individual liberty by creating a "healthy balance of power between the States and the Federal Government," thereby reducing "the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Constitution thus divides "authority between federal and state governments for the protection of individuals," *New York v. United States*, 505 U.S. 144, 181 (1992), by establishing a national government that may exercise only a "few and defined" enumerated powers. *Marbury v. Madison*, 5 U.S.

(1 Cranch) 137, 176 (1803) (Marshall, C.J.) (citing *The Federalist* No. 45 (James Madison)). Moreover, even the broadest of those powers—the federal government's power to regulate "commerce" among "the several states"—"has limits," which this Court "has ample power to [enforce]." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).

For reasons described below, both the spirit and letter of the Constitution's limits on federal power are exceeded by the migratory bird interpretation. At the outset, this Court has long recognized that land-use planning is situated squarely on the State side of the line of demarcation between federal and State responsibilities. The migratory bird interpretation not only prevents States from fulfilling their role as the laboratories for policy innovation, it does so in a context where both this Court's precedents and the lessons of experience teach that States most often know best. *See* Part I, *infra*.

But even beyond policy implications, the limitless migratory bird interpretation cannot be squared with this Court's Commerce Clause jurisprudence. As is evident from the attenuated chain of reasoning employed by the court below—a chain so thin that it would permit unfettered federal regulation of *all* aspects of local affairs—the Corps' asserted regulatory justification lacks any substantial relation to economic activity of any kind, much less to interstate commerce. The occasional use of a wetland by a migrating bird "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Moreover, the fact that this intrusive regulation of non-economic activity has unfortunate economic side-effects cannot be used as a bootstrap to salvage the Corps' interpretation from constitutional infirmity. *See* Part II, *infra*.

Finally, although the Corps' interpretation squarely presents a grave constitutional issue, that issue may be avoided through a proper interpretation of the Clean Water Act

("CWA" or "Act"). This Court has cautioned that where Congress intends to intrude upon "the usual constitutional balance of federal and state powers," it should do so by issuing a clear statement. *Gregory*, 501 U.S. at 460. In this case, Congress not only failed to provide such a statement, it expressly stated the opposite—that States should continue to play the "primary" role in regulating land use, planning, and zoning. *See* 33 U.S.C. § 1251(b) (1994). Accordingly, the Corps' migratory bird interpretation may and should be overturned on the statutory grounds argued by the Petitioners. *See* Part III, *infra*.

ARGUMENT

I. THE MIGRATORY BIRD INTERPRETATION INTRUDES UPON AREAS OF TRADITIONAL STATE CONCERN AND THEREBY DISRUPTS THE CONSTITUTION'S FEDERALIST DESIGN.

The Corps' migratory bird interpretation is a deep intrusion into a "usual" and traditional province of State regulation. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). It places literally millions of acres of residential neighborhoods, farmlands, and recreational areas under federal jurisdiction, merely because of the actual or potential presence of migratory birds. *See* Part I.A., *infra*. State initiatives in land use generally, and wetlands protection specifically, are therefore increasingly threatened by federal action taken in the name of wetlands protection. *See* Part I.B., *infra*. This expansive federal displacement of local land-use, planning, and zoning law not only disrupts our system of dual sovereignty, but does so at the expense of States' recognized expertise in what this Court has described as "the quintessential" function of State government. *See* Part I.C., *infra*.

A. The Migratory Bird Interpretation Permits Federal Intrusion into Land-Use Planning for Virtually Every Plot of Land in the Nation.

There are over one hundred million acres of wetlands in the continental United States. *See* Thomas E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*, U.S. Fish & Wildlife Service (1990). Each year, between 100,000 and 200,000 acres of wetlands are lost, but another 100,000 to 200,000 acres of wetlands are created, due to natural processes and human activities. *See* Ralph E. Heimlich, *et al.*, *Wetlands and Agriculture: Private Interests and Public Benefits*, Agricultural Economic Report No. 765, U.S. Dep't of Agriculture 20-23, 53 (1998).

The vast majority of these wetlands—approximately three-fourths—are located on private lands. *See* Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?*, Environment, Mar. 1992, at 7, 29. A 1995 Corps study reveals that isolated wetlands, those areas that meet the regulatory definition of a "wetlands" yet lack a hydrological connection to navigable waters of the United States, account for a significant portion of wetlands generally. *See* U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995). That 41-state study found that over eight million discrete parcels of less than a half-acre in size meet the Corps' wetland definition. *See id.*

Under 33 C.F.R. § 328.3(a) and the "migratory bird interpretation," the Corps regulates all manner of activity on these small and privately owned wetlands without any regard to the potential commercial impacts of those regulated activities. Each year, the Corps approves approximately 85,000 permits for the use or modification of designated wetlands. *See* U.S. Gen. Accounting Office, Report No. GAO/RCED-98-150, *Wetlands Overview: Problems With Acreage Data Persist* 36 (1998). Because nearly any activity that can result in the deposit of "fill" material onto land is covered, the Corps

regulates even the most basic acts by landowners, including "the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee." 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999) (providing final notice of modification of permits involving single family housing). Under existing regulations, the Corps has even required permits for residential construction impacting a closet-sized parcel (26 square feet) and a local mosquito control project affecting a recreation-room-sized parcel (400 square feet) of wetlands. *See* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994).

The Corps regularly brings enforcement actions against landowners large and small for actions such as building vacation homes. *See Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Robert McMackin) (describing the Corps' determination that construction of a vacation home on a third of an acre lot violated federal wetlands regulations). Although purportedly adhering to a *de minimis* exception, the Corps nonetheless asserts authority to regulate "walking, bicycling or driving a vehicle through a wetland," because such activities could result in the "discharge of dredged material." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993).

This looming regulatory edifice rests on a narrow sliver of federal law—section 404 of the Clean Water Act. *See* 33 U.S.C. § 1344 (1994); *see also* Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816; 33 U.S.C. § 1251 note. The CWA prohibits only the "discharge of any pollutant" into "*navigable* waters" of the United States without a permit. 33 U.S.C. § 1311(a) (1994) (emphasis added). Section 404 of the CWA in turn authorizes the Corps to issue permits "for the discharge of dredged or fill material," subject to oversight by the Environmental Protection Agency ("EPA").

33 U.S.C. § 1344(a), (c). For purposes of these provisions, "navigable waters" are defined as "the waters of the United States." 33 U.S.C. § 1362(7) (1994).

It is the regulations promulgated by the Corps and EPA—not the statute itself—that expansively defines the "waters" subject to the Corps' regulatory regime. The most crucial of these regulations defines the "waters" over which the Corps asserts authority to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of *which could affect interstate or foreign commerce* including any such waters: (i) Which are or *could be used* by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or *could be taken* and sold in interstate or foreign commerce; or (iii) Which are used or *could be used* for industrial purpose by industries in interstate commerce.

33 C.F.R. § 328.3(a)(3) (emphases added); *see also* 40 C.F.R. § 230.3(s) (identical definition promulgated by the EPA). Moreover, the Corps further extends this already expansive definition to cover "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." 33 C.F.R. § 328.3(a)(7).

Finally, in case there were any doubt that the Corps seeks authority over as much land as possible, the Corps issued its migratory bird interpretation of the "could affect commerce" standard set out in section 328.3(a)(3). Specifically, in a 1986 regulatory preamble, the Corps "clarified that waters of the United States" as defined by the Corps and EPA "also include" those waters "[w]hich are or *would be used* as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or *would be used* as habitat by other migratory birds which cross

state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (emphases added). This interpretation must be read in light of the fact that there are an estimated 2.5 to six billion birds in the United States, two-thirds of which may be described as "migratory." *Solid Waste Ass'n of N. Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) ("*SWANCC*"), *cert. granted*, 120 S. Ct. 2003 (2000). The "migratory bird interpretation" (sometimes called the "migratory bird *rule*") therefore purports to authorize jurisdiction over any plot or parcel that might possibly serve as landing ground for one of 1.66 to four billion birds. *See id.* at 847.

Commercial activity as such is *not* a focus of the federal wetlands program. Rather, the migratory bird interpretation controls the use of lands that meet the federal definition of "wetlands," regardless of whether or not they are to be used or modified for commercial purposes, or have any discernible connection to commerce. Both on their face and as applied by the Corps and EPA, neither the regulations themselves nor the migratory bird interpretation requires "that the regulated activity have a substantial effect on interstate commerce," or "that the covered waters have any sort of nexus with navigable, or even interstate, waters." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

Because it lacks any requirement of nexus to economic, interstate, or commercial activity, the Corps' interpretation ineluctably inserts federal regulators into local land-use decisions for virtually every parcel of land in the nation. As the Corps correctly noted in a letter to EPA's Director of Wetlands Protection, "it is very unlikely that there is any waterbody in the United States that would have [other Commerce Clause] connections and not some type of migratory bird usage." Letter from Gen. Peter J. Offringa to Mr. David G. Davis and

accompanying memorandum (Oct. 30, 1987).[2] Few, if any, parcels of land are so misbegotten that they are beyond any actual *or potential* use by these billions of migrating birds. As a result, the logic underpinning the Corps' migratory bird interpretation may be used to justify federal regulation of private land from coast to coast, making the Corps' section 404 program a *de facto* federal land-use law reaching into every corner of the Nation.

B. Under Our System of Government, Land-Use Planning is "the Quintessential" Function of States.

Environmental concerns relating to land usage have long been the province of State and local regulation. The Court has therefore observed that "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (same); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (recognizing "the authority of state and local governments to engage in land use planning"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court has also deemed "zoning laws" and land-use controls as "*peculiarly* within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) (emphasis added); *see also United States v. Oregon*, 366 U.S. 643, 649 (1961) (holding that property law, including title, transfer, and inheritance, is "an area normally left to the States"). In fact, the Court has gone so far as to declare that "regulation of land use is perhaps *the* quintessential state activity." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (emphasis added).

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[2] Gen. Offringa's letter and accompanying memorandum appear as part of Exhibit 24 in the Appendix to the *Amici* Brief submitted by Serrano Irrigation District, *et al.*, in support of Petitioner. The documents are more fully discussed in Part III of that brief.

In 1963, nearly a decade before passage of the CWA, Massachusetts enacted the first statewide wetlands protection statute, which required state-issued permits as a precondition to filling or dredging of coastal wetlands. Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, *repealed by* 1972 Mass. Acts 784, § 2, *superceded by* Mass. Gen. Laws ch. 131, § 40 (1991). Massachusetts then extended such protections to inland wetlands two years later—a full decade before the Corps began regulating wetlands in the aftermath of the decision in *Natural Resources Defense Council v. Callaway*. *See* 392 F. Supp. 685, 686 (D.D.C. 1975) (directing that wetlands be regulated under CWA section 404). Moreover, although the Massachusetts law was the first state-level statute, it was far from the first local initiative to protect wetlands. Rather, the Massachusetts law itself was "based on a number of local zoning permit requirements already to be found in coastal states." Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States* 255 (Ass'n of State Wetland Managers, 1985).

Nor did Massachusetts act alone. Other States, including Connecticut, Georgia, and Washington, all took active measures toward protecting wetlands in the 1960s. In fact, by the time federal wetlands regulation was initiated by the 1975 *Callaway* decision, every coastal State but one had adopted coastal wetlands protections, and eleven States had passed statutes to protect freshwater wetlands as well. *See* Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers, 1994).

States not only have enacted wetlands regulatory requirements that match or exceed those of Section 404, they have also taken the lead in incorporating the latest advances in ecological research into concrete conservation initiatives. Accordingly, "State wetland programs have evolved

considerably over the last thirty years, and most are much more sophisticated than even five years ago." *Id.* at 20.

State wetland protection efforts are diverse, ranging from traditional permitting systems to incentive programs, "critical area" designations, and buffer zone requirements. This regulatory diversity reflects "the [biological] diversity of freshwater wetland types across the nation and state preferences." *Id.* at 12. State efforts are further complemented by wetlands protection measures enacted by thousands of local governments nationwide. *See* Jonathan H. Adler, *Wetlands, Waterfowl and Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 48-52 (1999) (summarizing the history of state wetland regulation). State wetlands protections thus confirm Justice Brandeis' observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262,. 311 (1932) (Brandeis, J., dissenting).

These longstanding and fruitful State initiatives are nonetheless threatened by the Clean Water Act's growing displacement of local land-use law. The sole function of the migratory bird interpretation, it should be remembered, is to provide jurisdiction over lands that would otherwise lie beyond federal jurisdiction—isolated wetlands that, *by definition*, have no physical or hydrological connection to other wetlands. Because of that interpretation, State and local agencies that have carefully reviewed likely impacts of proposed land uses often see their decisions vetoed by federal agencies that have not even explained how a proposed use implicates any commercial or interstate interests. The Corps' broad interpretation of Section 404 threatens the State laboratories that have produced the pioneering achievements in wetlands protection.

C. The Migratory Bird Interpretation Unwisely Infringes State Authority.

The *de facto* displacement of local land-use decisions that stems from the Corps' wetlands program is an unwise departure from the genius of our federalist system. As the Court recognized in *Gregory*, the "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). A "decentralized government" will, in particular, "be more sensitive to the diverse needs of a heterogeneous society;" increase opportunities "for citizen involvement in democratic processes;" allow "for more innovation and experimentation in government;" and make "government more responsive by putting States in competition for a mobile citizenry." *Id.* Accordingly, the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests," should "endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

In this respect, a wise preservation of State and local authority over land-use decisions is closely analogous to a wise defense of the national government against intrusive State regulation of national concerns like the flow of commerce. Interstate commercial activity, as the Framers well knew, is best promoted by minimizing uncertain or duplicative regulatory requirements. *See Missouri Pac. R. Co. v. Stroud*, 267 U.S. 404, 408 (1925) ("It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."). When an automobile is designed in Japan, built in Ohio, purchased in Maryland, and driven in the District of Columbia, the imposition of local product safety standards, whether through legislatures or the courts, compromises this overriding national interest in the free flow of goods and services. *Cf., e.g., Geier v. American Honda Motor Co.*,120 S. Ct. 1913 (2000). In such circumstances, the only hope for economically efficient regulation is a national rule; hence, wise congressional and sound judicial action in furtherance of such rules furthers the Framers' design. *See id.*

In the area of land-use regulation, the situation is largely reversed: Local land-use planning is not a traditional sphere of national regulation, nor in many cases is it conducive to treatment by national rules. The imposition of federal land-use controls therefore confuses what would otherwise be a tolerably clear allocation of responsibility between the federal government and the States. Here, it is the very imposition of federal rules that creates nonuniformity, subjects parties to duplicative and conflicting requirements, and generates legal uncertainty. Having "split the atom of sovereignty," the Framers determined that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). But for these dual capacities to be meaningful, they must continue to correspond to a two-tiered system of well allocated governmental responsibilities. That system of allocated responsibilities traditionally and effectively assigns authority over land usage, planning, and zoning largely to the States. This Court should respect that assignment.

II. THE CORPS' MIGRATORY BIRD INTERPRETATION VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause authorizes Congress to regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce or persons and things in interstate commerce" and "those activities having a *substantial relation* to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Specifically, in order to satisfy the third prong of this test—the prong relied on by the Seventh Circuit below—federal regulatory activity must "substantially affect"

commerce. *SWANCC*, 191 F.3d at 849. As demonstrated below, however, the potential presence of birds on wetlands does not even approach the level of commercial effects required under this Court's precedents.

A. The Corps' Migratory Bird Interpretation Unconstitutionally Asserts Regulatory Authority Over Noncommercial Activity.

The Corps' migratory bird interpretation of the Clean Water Act, like § 922(a) of the Gun-Free School Zones Act, "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Nor is the rule "an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* (emphasis added). The rule instead focuses on actual or potential landings by migrating birds—activities that neither "arise out of" nor "are connected with a commercial transaction." *Id.; accord United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("The regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters.").

The Seventh Circuit nevertheless upheld the Corps' regulation, relying upon the cumulative impacts doctrine. *See* 191 F.3d at 850 (noting "the relevant legal question for our case is whether the destruction of the natural habitat of migratory birds *in the aggregate* 'substantially affects' interstate commerce") (emphasis added). The court reasoned that because migratory birds require habitat; and because human activities like hunting and bird-watching relate to birds; and because these activities in turn support commercial endeavors involving tourism and consumer purchases; and because those endeavors—taken in the aggregate—"substantially affect" commerce, *therefore* the *Lopez* test is satisfied. *Id.*

The Seventh Circuit's chain of inference is even more "attenuated," and hence less adequate, than those expressly rejected by this Court in *Lopez* and *United States v. Morrison*, 120 S. Ct. 1740 (2000). The fact that the federal government might be authorized to enact regulations to protect migratory birds does not mean that the federal government may control each and every environment in which migratory birds *might* be found, any more than the government's undoubted authority to regulate transfers, sales and uses of guns authorizes regulation of elementary schools and other places where guns *might* be found.

Moreover, the Seventh Circuit's claim that "habitat" serves as a meaningful jurisdictional limit is also without merit. *See* 191 F.3d at 850. Under the Corps' interpretation, all that 33 C.F.R. § 328.3(a) requires is that an activity "*could* affect" interstate commerce or that lands "are or *would be used* as habitat by birds protected by Migratory Bird Treaties" or "are or *would be used* as habitat by other migratory birds which cross state lines." 51 Fed. Reg. at 41,217 (emphases added). EPA and the Corps have further asserted jurisdiction when "the characteristics of the waterbody would lead *one to expect* it to be used as habitat for *at least part of the life cycle* of migratory birds." U.S. Army Corps of Engineers/Environmental Projection Agency Joint Memorandum on "Clean Water Act Jurisdiction Over Isolated Waters," accompanying letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987). As the Corps recognized, "it is very unlikely that there is *any* waterbody in the United States that would have [any other Commerce Clause] connections and not some type of migratory bird usage." Letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987) (emphasis added).

To be sure, as the Corps pointed out in *certiorari* briefing, "Petitioner's proposal to construct and operate a municipal solid waste landfill . . . is clearly an economic activity." Opp. 11 n.6. But the Corps itself acknowledged before this litigation

that "[a]n interstate commerce connection must be based on the use or potential use of the waterbody *prior to* the commencement of the activity subject to corps regulatory authority." Corps/EPA Joint Memorandum accompanying Letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987) (emphasis added). It is therefore the travel patterns of migratory birds and the activities that the Corps has found that could result in "discharge of dredged material," such as "walking," "bicycling," and "driving a vehicle," that matter for purposes of the Commerce Clause analysis.

The flaw in the Corps' rationale is that it fails to establish "any limitation on federal power" in the area of local land-use regulation, "where States historically have been sovereign." *Lopez*, 514 U.S. at 564. Indeed, the human activity that purportedly confers regulatory jurisdiction on the Corps, in contrast to committing violent acts against women or bringing guns to school, will often be trivial. "Walking, bicycling or driving a vehicle" through a wetland all might suffice because all of these activities could result in "discharge of dredged material." 58 Fed. Reg. at 45,020. But if those trivial activities, coupled with self-propelled travel by migratory birds, are enough to uphold federal regulatory authority, there truly are no limits to the possible federal co-option of State land-use, planning, and zoning law. Here, as in the recent decision in *Jones v. United States*, if the Court were "to adopt the Government's expansive interpretation," then "hardly a [parcel of] land would fall outside the federal statute's domain." 120 S. Ct. 1904, 1911 (2000).

But as *Morrison* reaffirms, while the Court has not yet adopted "a categorical rule against aggregating the effects of any noneconomic activity," it has noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature*." 120 S. Ct. at 1751 (emphasis added). The "substantial effects" tests of *Lopez* and *Morrison* thus

forbid the invocation of supposedly cumulative economic impacts of regulation of non-commercial activity in order to establish authority under the Commerce Clause. Such leaps of logic would require courts to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. A substantial-effects analysis of that sort would permit federal regulation of every conceivable human activity, up to and including the "activity" of sleeping. *Cf. Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 839 (4th Cir. 1999) (en banc) (noting estimates of the costs relating to insomnia at between $92.5 and $107.5 billion per year), *aff'd sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000). "*Lopez*'s review of Commerce Clause case law" therefore "demonstrates" that in cases sustaining "federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of *economic endeavor*." *Morrison*, 120 S. Ct. at 1750 (emphasis added).

Here, however, the regulatory scheme is not specifically focused on *economic* endeavors, and there is "no express jurisdictional element" that might otherwise "limit" the regulation's reach to commercial activities. *Lopez*, 514 U.S. at 562. The cumulative effects doctrine therefore cannot save the Corps' asserted authority from infirmity.

B. Economic Side-Effects from Regulation of Noncommercial Activity Cannot Support Federal Regulation under the Commerce Clause.

Under *Lopez* and *Morrison*, it is the economic nature of the *class of regulated activity*, not some measurable economic fallout from the duplicative and unconstitutional regulation itself, that must provide the basis for regulation under the Commerce Clause. In *Morrison*, for example, no one suggested that the economic impacts of the civil penalties *themselves* might provide the necessary commercial nexus. *See*

120 S. Ct. at 1745; 42 U.S.C. § 13981. Indeed, were it otherwise, Congress could evade the Constitution at will simply by magnifying unconstitutional schemes to the point where they become so misguided as to "substantially" (and destructively) affect the nation's economy. But as the Court made clear in *Morrison*, it is the "economic nature of the regulated activity"—not the economic fallout from the regulatory activity—that plays the critical role in Commerce Clause analysis. *Morrison*, 120 S. Ct. at 1750.

This crucial distinction is apparent in the Court's cases that rightly uphold federal regulation of economic activities, such as mining, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and wheat production, *Wickard v. Filburn*, 317 U.S. 111 (1942). The distinction also appears in the Court's decision upholding Congress's power to regulate the taking, possession and sale of birds and other animals in *Andrus v. Allard*, 444 U.S. 51 (1979). The laws at issue in *Andrus* specifically targeted hunting and other activity intrinsically related to the animals' value as items in commerce; hence, those laws involved the regulation (prohibition) of commercial activity.

Here, by contrast, the migratory bird interpretation is not part of a regime aimed at economic activity as such; it instead presupposes migratory bird travel and targets everyday, non-economic activities like "walking," "bicycling," and "driving a vehicle." 58 Fed. Reg. at 45,020. Moreover, the direct economic benefits of gun-free schools and reducing gender-based violence are surely more important to the nation's economic well-being than those of preventing micro-scale "discharges" of "dredged material." Accordingly, if the direct impacts asserted in *Lopez* and *Morrison* are insufficient to allow the federal government to bootstrap regulation of noneconomic activity under the Commerce Clause, the impacts hypothesized here must also be inadequate for that purpose.

III. CONSISTENT WITH THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE ACT SHOULD BE CONSTRUED TO PRECLUDE THE MIGRATORY BIRD INTERPRETATION.

Although the migratory bird interpretation is constitutionally problematic, this Court need not address the constitutional issue it poses. Instead, this Court should follow the "guiding principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," a court's "duty is to adopt the latter." *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) (interpreting federal statute to avoid Commerce Clause issue) (internal citation and quotation marks omitted). This principle is particularly apposite here, where an agency interpretation, rather than a congressional enactment, is at issue.

This is the first time the Court has considered a Commerce Clause challenge to a federal agency's exercise of its delegated powers. Unlike *Lopez* and *Morrison*, this case presents a challenge to an agency's interpretation of its statutory authority, rather than a direct challenge to Congress' constitutional authority under the Commerce Clause. Specifically, the Petitioner challenges the Army Corps' assertion that its authority to regulate "navigable waters" pursuant to the Clean Water Act, 33 U.S.C. § 1344, encompasses authority to regulate each and every "damp depression" that might serve as a landing ground for migratory birds. *See* Brief for Petitioner. While Congress may be entitled to substantial (though not unlimited) deference in the interpretation of its Commerce Clause authority, the Corps is entitled to no such deference.

It is common ground that the deference that might otherwise be accorded to agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is inapplicable where, as here, an agency interpretation raises

serious constitutional concerns. The Constitution, and the corollary doctrine of constitutional avoidance, necessarily take precedence over *Chevron*. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding *Chevron* deference inapplicable under these circumstances); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[I]f we determine that the [agency's rule] presents a serious or grave constitutional question, we will owe the [agency] no deference even if its [regulations] are otherwise reasonable."), *cert. denied sub nom., Competition Policy Inst. v. U.S. West, Inc.*, 120 S. Ct. 2215 (2000); *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) (declining to grant *Chevron* deference to agency interpretations that raise "grave" constitutional questions), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 528 U.S. 1117 (1998); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (agency "not entitled to *Chevron* deference" where interpretation of law raises "constitutional difficulties"); *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1564 (11th Cir. 1995) (courts should not accord deference on "constitutional matters").

This Court accordingly has not hesitated to give "narrow constructions to statutory delegations [to administrative agencies] that might otherwise be thought to be unconstitutional." *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). "Where an otherwise acceptable construction of a statute would raise serious constitutional problems," the Court, as a matter of course, construes "the statute to avoid such problems." *DeBartolo*, 485 U.S. at 575. The undoubted rules are that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available," *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); and that a statutory construction "that avoids this kind of open-ended grant [of legislative power to an administrative agency] should certainly be favored." *Industrial*

Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion).

Here, however, nothing in the Clean Water Act or its legislative history indicates that Congress intended to federalize the traditionally local responsibility of land-use regulation, planning, and zoning. *See* Brief for Petitioner. To the contrary, the Act manifests precisely the opposite intent by endorsing the States' continued, preeminent role in regulating land use:

> It is the policy of Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .

33 U.S.C. § 1251(b) (emphasis added). The Clean Water Act itself thus directs that it not be construed to trump State control over land-use planning.

This Court's reluctance to conclude that Congress authorized regulation raising constitutional concerns is applicable in situations where federalism issues are implicated. In cases of novel federal intrusions into local matters that "would upset the usual constitutional balance of federal and state powers," it is "incumbent upon the federal courts to be certain of Congress' intent." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). This "requirement" assures that Congress "has in fact faced and intended to bring into issue, the critical matters involved in the judicial decision." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation omitted), *overruled in other respects, Alden v. Maine*, 527 U.S. 706 (1999). Here, however, far from a plain statement authorizing the Corps' interpretation, Congress said exactly the opposite in section 1251(b), the provision that gives the States—not the Army Corps—the "primary" role in

determining land use. That statement alone compels the invalidation of the migratory bird interpretation.

The improbable nature of the authority asserted by the Corps is nonetheless underscored by other environmental statutes that illuminate the Clean Water Act. "[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 n.17 (2000). In this way, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000). Although the Corps says that its interpretation is necessary to protect the habitats of migratory birds, Congress has enacted *other* statutes to address that very problem. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. § 703 (1994); Eagle Protection Act, 16 U.S.C. § 668 (1994); Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1994). Those laws accomplish directly what the Corps would have the Clean Water Act target indirectly: protection of migratory birds. Accordingly, even if one were otherwise inclined to accept the Corps' interpretation of the CWA's purposes, it would still strain credulity to think, as the Corps contends, that Congress has given the Department *of Defense* greater say over waterfowl habitats than, say, the Fish and Wildlife Service of the Department of the Interior.

In sum, the Clean Water Act could authorize a migratory bird interpretation only if it contained a clear statement to that effect. *See Gregory*, 501 U.S. at 461. But far from providing such a clear statement, the Act, both on its face and read in light of surrounding statutes, says precisely the opposite—that it is the States that continue to enjoy the "primary responsibility" for land-use decisions. 33 U.S.C. §§ 1251(b), 1344. The Corps therefore erred in interpreting the Act to authorize usurpation of this traditional State responsibility.

CONCLUSION

For the foregoing reasons, the migratory bird interpretation would upset traditional federal-State relations, exceed federal authority under the Commerce Clause, and violate basic rules of construction. The judgment of the court of appeals should accordingly be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE, CENTER FOR INDIVIDUAL RIGHTS, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Center for Individual Rights (CIR) respectfully submits this brief amicus curiae in support of the Petitioner.[1] Written consent by all parties was granted by counsel for all parties and is being lodged with the Clerk of this Court.

The Center for Individual Rights is a public interest law firm. It was founded in 1989 and has litigated cases to pursue its goal of protecting individual liberty, broadly defined. In keeping with that philosophy, CIR has a strong interest in preventing the increasing hegemony of federal power, which it believes is a threat to individual liberty. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (Constitution created a federal government of enumerated powers "to ensure protection of our fundamental liberties," *quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). To this end, CIR has been at the forefront of the efforts to provide meaningful limits to Congressional power under the Commerce Clause. Most recently, CIR represented one of the defendants, and its General Counsel argued on behalf of both defendants, in *United States v. Morrison*, 120 S. Ct. 1740 (2000).

As interpreted by federal agencies, the Clean Water Act regulation at issue in this case is

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Center for Individual Rights affirms that no counsel for any party in this case authored this brief in whole or in part; and, further, that no person or entity has made a monetary contribution for the preparation or submission of this brief.

extraordinarily broad and can be deemed constitutional only by a breathtakingly expansive interpretation of the Commerce Clause. CIR believes that this Court should carefully consider the consequences of adopting such an interpretation before doing so, and, accordingly, submits this amicus brief for the Court's consideration.

STATEMENT

The Solid Waste Agency of Northern Cook County (SWANCC), a consortium of 23 municipalities, is challenging the Army Corps of Engineers' assertion of jurisdiction over a balefill project pursuant to the Corps' "migratory bird rule," which was promulgated pursuant to the Clean Water Act.[2] That rule purports to authorize the Corps to regulate placement of fill or dredged material on any isolated, intrastate water that does or potentially could serve as a habitat for any of the billions of migratory birds in the United States.

The Corps' claim of jurisdiction has halted the cooperative efforts of 23 municipalities to dispose locally of the solid waste generated by their citizens. In effect, the Corps has attempted to transform what has traditionally been a matter of local land use control into a matter controlled by the federal government. The Corps bases its claim of jurisdiction on the Clean Water Act (CWA)

[2] A "balefill" is a landfill where baled, rather than loose, material is dumped. There is water on the part of the site that SWANCC intends to use as a balefill.

and the Commerce Clause, on which authority the CWA was enacted.

The government's interpretation of those powers in this case (as in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 120 S. Ct. 1740 (2000)) would arrogate enormous and virtually unlimited power to the federal government. Indeed, the "migratory bird rule" is so broad that it is difficult to imagine a public or private project that would not require the Corps' approval. The Court must police the boundaries of the enumerated powers in the Commerce Clause, Article I, Section 8. In this case, it would require finding that the Corps' interpretation of the CWA set forth in its "migratory bird rule" is not permitted under the Commerce Clause.

ARGUMENT

I. Statutory and Regulatory Scheme

The Clear Water Act of 1972 states that the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. This rather broad proscription is qualified by (1) exceptions listed in other provisions of the Act which make it permissible to discharge a pollutant under circumstances not relevant here or with a permit granted by an agency of the federal government, and (2) the various definitions listed in 33 U.S.C. § 1362. Those definitions provide that a "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source" (33 U.S.C. § 1362(12)); a "pollutant" includes solid waste, sewage, garbage, heat, rock, sand, and cellar dirt (33 U.S.C. § 1362(6)); and

"navigable waters" means "the waters of the United States" (33 U.S.C. § 1362(7)).

That last definition is further elucidated by regulations issued by the Environmental Protection Agency ("EPA") and the Corps.[3] The Corps' regulations define "waters of the United States" in sweeping terms to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams. . . wetlands, . . . prairie potholes, . . . playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

[3] The Corps' regulatory definition is set forth in 33 C.F.R. § 328.3(a); EPA's are set forth at 40 C.F.R. 230.3(s). *See* 51 Fed. Reg. 41206, 41216-17 (Nov. 13, 1986). For ease of discussion, further citations are provided only to the Corps' definition.

> (iii) Which are or could be used for industrial purpose by industries in interstate commerce;
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (5) Tributaries of [the foregoing] . . . ;
> (6) The territorial seas;
> (7) Wetlands adjacent to [the foregoing]. . .

33 C.F.R. § 328.3.

The portion of the definition relevant here is paragraph (3), which defines the "waters of the United States" to include "[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . ." The waters that fall within the scope of paragraph (3) are "intrastate and isolated waters" (*i.e.* "truly isolated water bodies" that have no connection to any tributary system that drains or flows into traditional navigable waters or interstate waterways). *See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson*, § 3.c, at 3 (May 29, 1998).[4]

In the preamble to regulations promulgated in 1986, the Corps "clarified" that paragraph (3) waters (*i.e.* intrastate, isolated waters) also include waters:

[4] This joint EPA and Corps guidance is included in the Appendix hereto and is posted on the Corps' website at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/wilson.

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines . . .

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). It is this so-called "migratory bird rule" – not really a rule, at least not one promulgated with notice and comment – that the petitioner challenges as a legally impermissible basis for federal jurisdiction.

Notably, in asserting jurisdiction under its "migratory bird rule," the Corps does not rely upon any of the other paragraphs in its definition of "waters of the United States." For example, the Corps does not assert that jurisdiction is premised upon the water bodies at the SWANCC site being "waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce or foreign commerce" (paragraph 1). Nor does it assert that such water bodies are interstate waters (paragraph 2) or wetlands adjacent to interstate waters (paragraph 7). Rather, the "migratory bird rule" purports to authorize the Corps to regulate placement of fill or dredged material on any intrastate, isolated water solely on the basis that it does or potentially could serve as a habitat for any of the billions of migratory birds in the United States.

The breath of this definition is sweeping. Under the Corps' interpretation, it has permitting authority over any intrastate, isolated water body even though such water body has never been

used in interstate commerce, is not being used in interstate commerce, and is not susceptible to being used in interstate commerce. In the Corps' view, it can assert jurisdiction over any local discharge of fill material into any water body if it serves, or potentially could serve, as a habitat for any migratory birds. Under the definition, tossing a rock into a birdbath (or a lake or pond) without a permit constitutes a violation of Section 1311. So would owning a heated pool that birds find attractive. In enacting the Clean Water Act, Congress could not have intended to regulate these types of activities under the rubric of regulating water pollution.

II. Challenging Rules under the Commerce Clause

Under the Court's current Commerce Clause jurisprudence, Congress can pass three kinds of statutes: it may regulate the channels of interstate commerce, it may regulate the instrumentalities of interstate commerce, or persons or things in commerce, and it may regulate intrastate activities having a substantial relation to interstate commerce, *i.e.* activities that substantially affect interstate commerce. *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000). Under the last branch of that jurisprudence, two features deserve emphasis. First, the trivial nature of the interstate commerce effects of one instance of the intrastate conduct being regulated is irrelevant, so long as the cumulative effects of all instances have a substantial effect on interstate commerce. Second, the Court has only permitted this theory to be used when the

conduct being regulated is economic in nature. *Id.* at 1751.

Any challenge to a statute that is defended as an exercise of Congress' authority under the third branch of Commerce Clause jurisprudence, the "substantial effects" branch, must be a facial challenge (since the trivial nature of the effects of individual instances is irrelevant). Since SWANCC is precluded from making an argument about the minimal effects of its own conduct, it must challenge the statute as a whole. In doing so, the question is whether the conduct being regulated by the statute as a whole is "economic" in nature. What SWANCC itself was planning to do is irrelevant, just as Alfonso Lopez's possession of a gun so that he could deliver it for $40 was irrelevant to the outcome in *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

III. The "Migratory Bird Rule" Presents Serious Constitutional Difficulties

The question of concern to CIR is whether Congress, under its Article I, § 8, power to regulate "Commerce among the states," has authority so sweeping in scope as to allow the Corps to regulate activities in intrastate, isolated water bodies under the Corps' "migratory bird rule." In focusing on the Commerce Clause implications of the Corps' "migratory bird rule," CIR takes no position on whether the "rule" is a reasonable interpretation of the term "navigable waters." Of course, if the Court finds that the

"rule" is not a proper interpretation of the CWA, it might not reach the Constitutional issue.

While the original statute, limited to truly navigable waters that are part of an interstate system or waterways used for travel, might have been constitutional as a regulation of the channels of interstate commerce (the first kind of Commerce Clause legislation), Section 1311 cannot be so defended as interpreted by the Corps and EPA. As interpreted, it regulates the "discharge" of a "pollutant" (*e.g.*, "fill material") into virtually any body of water in the United States. Given the interpretations of those terms by the agencies, the statute cannot reasonably be interpreted as regulating the channels of interstate commerce, and the lower courts and respondents have not tried to defend the statute on that ground. Rather, it has been defended solely as an exercise of Congress' authority to regulate intrastate activities having a "substantial effect" on interstate commerce. And, under the "substantial effect" test, the Corps' "migratory bird rule" cannot reasonably be defended.

In fact, at least one Circuit has ruled that the Corps' paragraph (3) definition of intrastate, isolated waters -- the rule that the "migratory bird rule" purports to clarify – is an impermissible exercise of Congress' authority under the third branch of Commerce Clause jurisprudence, the "substantial" effects" branch. The Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), has held invalid the Corps' paragraph (3) definition of intrastate, isolated waters because it exceeded the Corps' regulatory power under the

Clean Water Act. 133 F.3d at 257. The court noted that, had Congress enacted the paragraph (3) intrastate, isolated waters definition as a statute, "it would present serious constitutional difficulties . . . under the Commerce Clause," because it does not require that the regulated activity have a substantial effect on interstate commerce, nor that those waters have any nexus to interstate or navigable waters. *Ibid.* Because the paragraph (3) intrastate, isolated waters definition is not a statute, the court refused to presume that Congress had authorized that Corps "to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Ibid.*

Here, the conduct being regulated as a whole is primarily non-economic in nature. Even if people sometimes pollute for economic reasons (because it is easier than disposing of it in a costly fashion), that does not mean it is economic activity. People often murder for economic reasons, but murder is not "economic" activity subject to Congress' Commerce Clause power. Economic activity involves an exchange between two or more uncoerced parties. *See* Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa Law Rev. 1 (1999). The activity which is "discharging pollutants," including the throwing of rocks in a birdbath, is not economic activity.

Nor has there been a showing that the purported cumulative effect of balefilling on an intrastate, isolated water body would have a

substantial effect on migratory birds or on interstate commerce. Any arguable link between the regulation of isolated, intrastate water bodies and a purported substantial effect on interstate commerce is attenuated, at most.

If the theory of the Corps were adopted by the Court, it would give Congress the power to regulate virtually every aspect of land and water use throughout the United States. Taking down a bird feeder in one's backyard, and thus making it less hospitable to birds that travel in interstate commerce, would be an act subject to Congress' Commerce Clause authority. Growing a garden that could attract flying insects that travel across state lines (or harvesting and consuming the produce that migratory birds might consume in that garden) would be an act subject to Congress' Commerce Clause authority. And, swatting flies that travel in interstate Commerce would be within Congress' Commerce Clause authority.

The Court has recently held (in *Lopez* and *Morrison*) that Congress cannot regulate non-economic acts that have some effect on human beings' ability to travel in interstate commerce. It would be (to say the least) passing strange to suggest that Congress can regulate non-economic acts that have some long-range effect on the ability of birds or insects to travel in interstate commerce. So long as it is for the Courts, and not Congress or federal agencies, to determine the scope of the Commerce Clause Authority, the Court must reject assertions of that authority that would grant Congress virtually unlimited authority to regulate all aspects of our daily lives

and relegate the States to trivial and unimportant actors in the federal system.

Respectfully submitted,

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APPENDIX

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Office of Wetlands, Oceans, and Watersheds
Washington, D.C. 20460

United States Department of the Army

U.S. Army Corps of Engineers
Washington, D.C. 20314

Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson

1. INTRODUCTION

a. On December 23, 1997, the U.S. Court of Appeals for the Fourth Circuit issued a decision in the case of United States v. Wilson, 133 F. 3d 251 (4th Cir. 1997). The decision resulted from an appeal from criminal convictions for discharging dredged and fill material into wetland areas subject to Clean Water Act (CWA) jurisdiction in Charles County, Maryland, by Mr. Wilson and two corporations, without obtaining the required CWA Section 404 permits. The Fourth Circuit overturned Mr. Wilson's criminal conviction because it identified legal errors in the jury instructions used in the case, as explained below. A petition for panel rehearing was denied January 26, 1998. The decision itself, press accounts of the decision, inquiries from the public, and discussions with Corps and EPA staff in the five states that comprise the Fourth Circuit all indicate the need for guidance regarding interpretation and implementation of that decision and restating the Corps' and EPA's longstanding interpretation of the regulations that describe CWA Section 404 jurisdiction over the various categories of waters of the United States.

b. The purpose of this memorandum is to explain the Wilson decision, to provide general guidance on the regulations concerning jurisdiction, and to provide specific guidance on jurisdiction applicable to the Fourth Circuit in light of Wilson. This guidance does not change the substantive requirements of existing Corps or EPA regulations, except to the extent necessary to comply with the decision of the Fourth Circuit Court of Appeals in the states comprising the Fourth Circuit. As described below, within the five states comprising the Fourth Circuit, the Corps and EPA will adhere to the holdings of law in the Wilson decision. At the same time, within the Fourth Circuit states, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. This approach addresses the concerns of the Fourth Circuit regarding jurisdiction over these waters.

2. SCOPE OF THE DECISION

a. The three-judge panel of the Court of Appeals that decided the case produced three separate written opinions. In reading the decision, it is important to remember that the three-judge panel produced legally binding holdings of law regarding only three matters: (1) the "criminal intent" that a judge and/or jury must find in order to convict any person of a criminal violation of the CWA, (2) whether the provision of the Corps regulation defining CWA jurisdiction over "isolated" water bodies (i.e., 33 CFR 328.3(a)(3)) is authorized by the CWA, and (3) the admissibility of expert testimony on legal interpretations. The United States believes that the Fourth Circuit's holdings of law on the first two issues were incorrect, and we reserve the right

to litigate these issues in other circuits. The Fourth Circuit's decision in the Wilson case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina). The first of the holdings of the Wilson decision (i.e., regarding "criminal intent") is primarily of concern to the U.S. Department of Justice (DOJ) whenever DOJ is considering whether, or how, to bring a criminal enforcement action under the CWA; the third holding relates to the conduct of trials. Neither of these issues will be discussed further in this memorandum. The focus of this memo is the issue of CWA jurisdiction.[1]

b. In addition to the three binding holdings of law noted above, two judges set out their views in conflicting, nonbinding discussions of two additional matters: (1) whether the CWA authorizes the United States to assert jurisdiction over "adjacent" wetlands even if those wetlands do not have a direct or indirect surface connection to other waters of the United States, and (2) whether the CWA authorizes the United States to assert CWA jurisdiction over the "sidecasting" of dredged material into waters of the United States during ditching or dredging activities in waters of the U.S. Because no binding decisions were reached on these matters, the Corps and EPA will continue to assert jurisdiction over adjacent wetlands and sidecasting activities consistent with our existing regulations and guidance. We believe that the opinion of Judge Payne, one of the judges on the panel, reflects a sound understanding of those regulations.

c. The Fourth Circuit's holding of law from Wilson that we must address is the following:

". . .we conclude that 33 CFR 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose

degradation 'could affect' interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce clause and therefore is invalid. . . ." (Slip opinion, page 3).

Although the Corps and EPA strongly disagree with that holding, we must implement it throughout the Fourth Circuit unless and until it is overruled or clarified in the context of another court decision. Consequently, in the Fourth Circuit, neither the Corps nor the EPA will cite or rely upon 33 CFR 328.3(a)(3) as the basis for asserting CWA jurisdiction over any area, until further notice. Nevertheless, this change in operating procedures does not necessarily mean that either the Corps or the EPA will decline to assert jurisdiction over any aquatic area in the Fourth Circuit states, for the reasons explained below.

3. GENERAL GUIDANCE REGARDING CWA JURISDICTION

a. In the Federal Water Pollution Control Act Amendments of 1972, the Congress directed the Federal Executive Branch to assert jurisdiction over all waters of the United States subject to Federal constitutional authority (primarily the authority of the "Commerce Clause" of the U.S. Constitution). (See, e.g., Conference Report, S. Rep. No. 236, 92d Cong., 2d Sess. at 144, reprinted in U.S. Code Cong. & Admin. News, p. 3822 (1972).) When the EPA and the Corps assert CWA jurisdiction nationwide over all waters of the United States, including wetlands, we are carrying out that statutory mandate. The Federal Courts have consistently upheld, and, in fact, required, this broad assertion of Federal jurisdiction under the CWA. (See, e.g., NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975); United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974); United States v. Byrd, 609 F. 2d 1204 (7th Cir 1979).)

b. The Corps of Engineers regulation at 33 CFR Part 328.3(a)

(2) is intended to interpret, explain, and implement the CWA's statutory mandate to assert jurisdiction over all "waters of the United States" subject to Federal constitutional authority. These regulations provide an interpretive definition of the term "waters of the United States" (i.e., those aquatic areas subject to Federal CWA jurisdiction), as follows:

1. First, paragraph (a)(1) defines the term "waters of the United States" to include all of the traditional navigable waters of the United States (i.e., "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide").

2. In addition, paragraph (a)(2) defines "waters of the United States" to include: "All interstate waters including interstate wetlands".

3. The next paragraph, (a)(3), further defines "waters of the United States" to include all water bodies (including all wetlands) that are intrastate and isolated (i.e., that do not eventually drain or flow into traditional navigable waters or interstate waters), but which still have connections with interstate or foreign commerce, and are subject to Federal jurisdiction under the Commerce clause.

4. The next paragraph, (a)(4), further defines "waters of the United States" to include any impoundment of any water body otherwise defined as a water of the United States under any other paragraph in 33 CFR 328.3(a).

5. The next paragraph, (a)(5), further defines "waters of the United States" to include all tributaries of any water body identified as a water of the United States under paragraphs (1) through (4) of 33 CFR 328.3(a).

6. The next paragraph, (a)(6), further defines "waters of the United States" to include the territorial sea.

7. Finally, paragraph (a)(7) defines "waters of the United States" to include all wetlands adjacent to any water body defined as a water of the U.S. in paragraphs (a)(1) through (6).

c. It must be emphasized that 33 CFR 328.3(a)(3) applies only to, and should be cited only regarding, CWA jurisdiction over truly isolated water bodies (i.e., intrastate lakes, streams, prairie potholes, etc.) that have no connection with any tributary system that flows into traditional navigable waters or interstate waters. For any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a tributary system of traditional navigable waters or interstate waters, one should not cite 33 CFR 328.3(a)(3), but instead cite the relevant subsections of 33 CFR 328.3(a), such as subsection (a)(1) (covering traditional navigable waters); (a)(2) (covering interstate waters); (a)(5) (covering tributaries to navigable or interstate waters); and/or (a)(7) (covering adjacent wetlands). Of course, outside the Fourth Circuit, if the Corps and/or EPA determines that a water body is in fact isolated and intrastate, then 33 CFR 328.3(a)(3) may be cited as the basis for CWA jurisdiction. If there is a factual dispute over whether a water body is isolated, 33 CFR 328.3(a)(3) may be cited (outside the Fourth Circuit) as an alternative basis for jurisdiction with appropriate documentation included as to why it applies.

d. There are also two practical reasons why EPA and the Corps strongly prefer to assert and document CWA jurisdiction over an aquatic area as part of a tributary system to traditional navigable waters, or as wetlands adjacent to such a tributary system, rather than as an "isolated," intrastate water body under 33 CFR 328.3(a)(3). First, there is a more

conclusive body of case law supporting CWA jurisdiction over an aquatic area based on that area's status as part of, or wetlands adjacent to, a tributary system to traditional navigable waters, rather than as isolated waters. The U.S. Supreme Court, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and many lower Federal Courts in other cases, have clearly upheld Federal CWA jurisdiction over all tributaries to traditional navigable waters, and over wetlands adjacent to those tributaries, based on the fact that, for example, pollutants placed in such tributaries or their adjacent wetlands can migrate through the tributary system into traditional navigable waters, and that flood storage eliminated upstream can cause flooding in the downstream tributary system. These principles apply whether a portion of the tributary system is intermittent or perennial (See, e.g., Quivira Mining v. U.S. Environmental Protection Agency, 765 F. 2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986)). The Supreme Court has not yet directly addressed CWA jurisdiction over "isolated," intrastate water bodies that do not flow into tributaries to traditional navigable waters, although a number of lower federal courts have upheld federal CWA jurisdiction over isolated water bodies, including isolated wetlands. See, e.g., Hoffman Homes, Inc., v. EPA, 999 F.2d 256 (7th Cir. 1993); Leslie Salt Co. v. United States, 896 F. 2d 354 (9th Cir. 1990); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), cert. denied sub. nom. Cargill, Inc. v. United States, 116 S. Ct. 407 (1995); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); SWANCC v. U.S. Army Corps of Engineers, 1998 U.S. Dist. Lexis 3994 (N. Dist. Ill. 1998).

e. The second reason is a matter of ease of proof. When a water body is shown to be part of a tributary system to interstate or traditional navigable waters, that usually easily-established fact is sufficient to show that the water body can be regulated by the federal government under the commerce

clause. United States v. Ashland Oil and Transportation Corp., 504 F.2d 1317 (6th Cir. 1974). For isolated waters under 33 CFR 328.3(a)(3), each water body must have its own nexus with interstate commerce: that is, the use, degradation or destruction of the isolated water body could affect interstate commerce (e.g., the water body in question would support the hunting of migratory game birds or other animals, or the harvesting of timber or other products, or the trapping of fur-bearing animals, or is suitable habitat for migratory birds, etc.). Paragraph (a)(3) of the regulation sets out a non-exclusive list of ways an isolated water body could have the necessary commerce connection. Additional examples are set out in preamble language (51 Fed. Reg. 41,217 (Nov. 13, 1986), 53 Fed. Reg. 20,765 (June 6, 1988)). This preamble discussion reflects a September 12, 1985, memorandum by the General Counsel of EPA explaining and asserting Clean Water Act jurisdiction over isolated waters based on their use by migratory birds and federally listed endangered or threatened species. Of course, for a particular "isolated," intrastate water body, Corps or EPA field staff may be able to document only some relatively small-scale connections between that water body and interstate and foreign commerce (e.g., that the isolated water body serves as habitat for migratory birds). Nevertheless, EPA and the Corps believe, and if necessary will demonstrate, that each of these classes of interstate commerce-related activities associated with isolated waters (e.g., migratory bird usage of isolated waters), taken as a whole or in the aggregate, has a substantial effect on interstate or foreign commerce, as required by United States v. Lopez, 514 U.S. 549, 1995.

4. GUIDANCE SPECIFIC TO THE FOURTH CIRCUIT

a. The remainder of this guidance addresses assertion of jurisdiction over isolated waters within the Fourth Circuit until further notice. Although the written opinion in the Wilson case

regarding 33 CFR 328.3(a)(3) is not entirely clear, it appears that the Court's fundamental objection to that provision of the Corps' regulation is that, by its terms, 33 CFR 328.3(a)(3) asserts CWA jurisdiction over isolated water bodies based on their potential, as opposed to actual, connections with interstate or foreign commerce. The court seemed concerned that this language fell short of the "substantial effect test." Consequently, the court declared that 328.3(a)(3) was invalid because it exceeded Congressional intent.

b. As stated above, while the Corps and EPA believe that the court's decision regarding the legality of the Corps' jurisdictional regulation is wrong, we will fully comply with and implement the Fourth Circuit's holding in the Wilson case (within the states constituting the Fourth Circuit) so long as it represents the controlling law on this point within the Fourth Circuit. Consequently, until further notice, neither the Corps nor the EPA will cite or rely upon the regulatory provision of 33 CFR 328.3(a)(3) as a basis for asserting CWA jurisdiction over any area for any purpose within the Fourth Circuit. Similarly, within the five states comprising the Fourth Circuit, neither the Corps nor the EPA will assert CWA jurisdiction over any isolated, intrastate water body where the only basis that the Government can establish for such jurisdiction would be potential effects on interstate or foreign commerce.

c. Nevertheless, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. Those actual connections with and effects on interstate or foreign commerce may include all

of the types of actual effects on interstate or foreign commerce that the Corps and EPA have traditionally relied on: for example, use for recreation by interstate or foreign travelers; use for taking fish or shellfish sold in interstate or foreign commerce; use by industries operating in interstate or foreign commerce; use by migratory waterfowl, other game birds, or other migratory birds that are sought by hunters, birdwatchers, or photographers, or are protected by international treaty, thereby affecting interstate commerce[3]; or use by federally listed endangered or threatened species. Corps and EPA headquarters will be compiling information on the aggregate effects of various activities on interstate commerce, so that, as the need arises, the Corps and EPA can document that, in the aggregate, the use, degradation, or destruction of isolated water bodies would have substantial effects on interstate or foreign commerce. Existing case law will assist this endeavor (e.g., for migratory birds see Hoffman Homes, 961 F.2d 1310 (7th Cir. 1992); for interstate travelers see Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); for endangered species, Palila, 471 F. Supp. 985, 991-995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), and National Association of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997)).

d. Corps and EPA field offices within the Fourth Circuit should make it clear to members of the regulated public that both agencies will still assert jurisdiction over isolated water bodies, including isolated wetlands, on a case-by-case basis within the Fourth Circuit states, based on the CWA statute itself, where there is an actual connection between such water bodies and interstate or foreign commerce, and the effect on such commerce, individually and/or in the aggregate, is substantial. The Corps and EPA will work to minimize any delays or inconveniences to the regulated public that might attend the establishment of the actual connections with interstate or foreign commerce for individual isolated water bodies.

e. Previously issued Section 404 permits authorizing discharges into isolated waters in the Fourth Circuit remain in effect as issued. The Corps and the EPA do not believe that the Fourth Circuit's decision in the Wilson case requires the Corps to modify such previously issued permits or to delete permit conditions requiring compensatory mitigation for activities in isolated water bodies, or to delete other permit conditions relating to such waterbodies. Moreover, to the extent that jurisdiction over isolated waters is established as identified above, no modifications to existing practice for normal compensatory mitigation or other permit conditions are necessary for permits issued in the future for activities in isolated water bodies.

5. FURTHER INFORMATION

a. In the near future, EPA and the Corps intend to promulgate a rule addressing the jurisdictional issues discussed in this guidance, with full opportunity for public review and comment.

b. If you have any questions regarding this guidance memorandum, please contact your local EPA Regional Office or Corps District Office. For EPA Headquarters, please call John Goodin at (202) 260-9910. For Corps Headquarters, contact Sam Collinson at (202) 761-0199.

Robert W. Wayland, III /s/ 5/29/98

Director, Office of Wetlands, Oceans, and Watersheds

Office of Water

U.S. Environmental Protection Agency

FOR THE COMMANDER:

Charles M. Hess /s/ 5/29/98

Chief, Operations, Construction, and
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Directorate of Civil Works

U.S. Army Corps of Engineers

1. The issue addressed by the court's opinion was whether the wetlands in question were jurisdictional, not how to determine whether an area is a wetland.

2. EPA's regulations contain equivalent (although not verbatim) definitions; the two agencies' regulations cover the same waters. For convenience, this discussion refers to the Corps' regulations.

3. Although Tabb Lakes, Ltd. v. United States, (715 F. Supp. 726, aff'd without opinion, 885 F.2d 866 (4th Cir., 1989)), concluded that EPA/Corps guidance could not be cited as the legal basis for interstate commerce nexus using migratory birds because that guidance had been issued without notice and comment, the decision did not prohibit the use of migratory birds to establish a connection to interstate commerce under the Clean Water Act. Consequently, notwithstanding the Fourth Circuit's decision in Tabb Lakes, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds.

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY; VILLAGE OF BARTLETT;
AND CITIZENS AGAINST THE BALEFILL,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF OF AMICI CURIAE ARID OPERATIONS, INC. AND THE CALIFORNIA MINING ASSOCIATION IN SUPPORT OF PETITIONER

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In The Supreme Court of the United States

No. 99-1178

Solid Waste Agency of Northern Cook County, Petitioner,

v.

United States Army Corps of Engineers, et al., Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF FOR ARID OPERATIONS, INC. AND THE CALIFORNIA MINING ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

Arid Operations, Inc. ("Arid") is the proponent of the Mesquite Regional Landfill (the "Landfill" or the "Mesquite Landfill"), a regional solid waste landfill under development in the California Sonoran Desert. Members of the California Mining Association ("CMA") include mining companies that

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[1] Pursuant to Rule 34.6, amici state (i) that no counsel for any party authored this brief in whole or in part; and (ii) that only Arid Operations, Inc. and members of the California Mining Association made monetary contributions to the preparation and submission of this brief. Pursuant to Rule 37(2)(a), letters from counsel for all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

conduct exploration or mineral development activities in the same or similar desert regions. Recently, the United States Army Corps of Engineers ("Corps" or "Corps of Engineers") has claimed jurisdiction under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, over dry washes and erosional features throughout the arid desert regions in which the projects of these entities are located. Thus, the decision that the Court renders in this case will set the standard that the Corps and the United States Environmental Protection Agency ("EPA") will apply in future project permitting decisions that will affect Arid and the members of CMA. *Amici* therefore have a critical interest in the outcome of this case.

THE MESQUITE REGIONAL LANDFILL

The Mesquite Landfill site is located in eastern Imperial County, California, adjacent to the site of the existing Newmont Mesquite Gold Mine and Ore Processing Facility, as described below in this brief. The entire Mesquite Landfill site covers approximately 4,245 acres. The Landfill is located on an alluvial desert plain near the Algodones Dunes, about 6 miles southwest of Mount Barrow, California.

The Mesquite Landfill has been approved for the development of a 600 million-ton municipal solid waste landfill, with an expected operational life of 100 years. The Landfill has undergone extensive environmental studies and has received all necessary regulatory approvals, including a Conditional Use Permit from Imperial County; a Record of Decision approving an extensive land exchange with the U.S. Department of Interior, Bureau of Land Management ("BLM"); a "no jeopardy" opinion issued pursuant to the Endangered Species Act, 16 U.S.C. §§ 1521 et seq. ("ESA"), by the U.S. Fish and Wildlife Service ("USF&WS") for the desert tortoises which inhabit the area, as well as analogous

state action under the California Fish and Game Code; and a Solid Waste Facility Permit from the California Integrated Waste Management Board pursuant to California's EPA-approved implementation of the Resource Conservation and Recovery Act, codified within the Solid Waste Disposal Act at 42 U.S.C. §§ 6901 et seq. ("RCRA"). Issuance of these permits was preceded by comprehensive environmental studies completed under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA") and analogous state law.

Precipitation in the site tends to occur in short, intense but extremely rare storm events, with average *annual* rainfall of about 3.5 inches. These storm events often create new erosional features in the desert landscape, identified as "dry washes." As is typical for desert regions of the west, the site contains many of these interbraided dry washes. All dry washes within the site are at best "ephemeral," a term of art meaning that they convey surface flows only during and immediately following rare precipitation events. Otherwise, and as a general rule, these washes contain no water. There are no navigable or other surface waters at or anywhere near the Mesquite Landfill. In fact, all the ephemeral washes crossing the site drain toward the southwest, ultimately seeping quickly into the sandy soils or, in extreme storm events, flowing at most approximately 4 miles from the site into the Algodones sand dunes, where they evaporate. Thus, the washes are hydrologically isolated, meaning that they have no connection on the upstream or downstream side with any other waters.

The Corps has nonetheless determined that over 338 acres of the dry desert washes within the 4,245-acre site, or nearly 10% of this stark desert landscape, constitute "waters of the United States." The fact that such a significant portion of this essentially waterless land could be subject to the Corps's claimed jurisdiction under the Clean Water Act

illustrates how far the Corps has gone in stretching its jurisdictional boundaries.[2] The effect of the Corps finding this acreage of "waters of the United States" is that the Corps thereby gains control over the entire project.

MINE PROJECTS OF CMA MEMBERS

A number of desert mining projects operated by various CMA members have been subject to similar expansive jurisdictional claims by the Corps. For example, the Mesquite Gold Mine and Ore Processing Facility (the "Mesquite Mine"), which is owned by CMA member Newmont Mining Corp., is located adjacent to the Mesquite Landfill. The Mesquite Mine is an active precious metal mine that has been in operation for nearly two decades. Throughout the 1980s, the Mesquite Mine disturbed over 4,000 acres of land under the strict supervision of several state and federal governmental agencies. The Corps during this period did not assert Section 404 jurisdiction over the project, and indeed in commenting on NEPA documentation required for the project in 1984, the Corps specifically disavowed any jurisdiction over the site and declined to comment further. Yet, in recent years, as in the instant case below, the Corps has begun to shift its position and claim Section 404 jurisdiction over desert washes within the arid

[2] As a result of a negotiated resolution, A[illegible] Operations agreed with the Corps to obtain a Clean Water Act § 404 permit for certain ancillary facilities (such as roads) to be constructed in connection with the Landfill. This result, where no permit was demanded for the Landfill itself, stemmed from the decision in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) (RII), which held for several reasons that the Corps has no regulatory authority under Section 404 over solid waste landfills permitted under RCRA Subtitle D. In a recent Notice of Proposed Rulemaking, however, the Army Corps has asserted that it intends in the future again to assert jurisdiction over permitted landfill operations, notwithstanding the RII decision. 65 Fed. Reg. 21291 (April 20, 2000).

project site as "waters of the United States" and has demanded Section 404 permits relating to recent exploration and development activities proposed for the site. Due to the substantial cost, delay and uncertainty involved in attempting to challenge Corps jurisdiction, Newmont has agreed under protest to obtain such permits from the Corps.

Similarly, the Imperial Project Mine (the "Imperial Project") is located entirely within the arid Sonoran Desert region, and yet has also been subject to far-reaching jurisdictional claims and demands by the Corps. Glamis Imperial Corporation, a member of CMA, is the project proponent. The Imperial Project is a proposed open-pit gold and silver mining operation, which encompasses 1,631 acres within Imperial County, California.

Again using a combination of the Corps's expansive, "high water mark" approach to identifying "waters," as described below in this brief, and the Corps's Migratory Bird Rule, EPA and the Corps have asserted that the Imperial Project area contains 114.5 acres of dry washes within the project area that constitute "waters of the United States." As a result, the agencies have required a Section 404 permit for the entire project. Among the resulting analyses required for this project was an identification of all potential alternative areas in the western United States that would be reasonable to consider in locating a gold and silver mine, and a demonstration that the project as proposed met with EPA's asserted criteria that "only projects that absolutely need to be sited in waters are authorized." EPA, Comment Concerning Public Notice No. 96-20083-TCD (June 26, 1998). Thus, under the Corps's current policies and interpretations, EPA and the Corps have required a project in the middle of the driest desert in the country to justify itself as a project to be sited "in waters." In fact, EPA went so far as to describe the ephemeral desert washes at the Imperial Project area as Aquatic Resources of National Importance.

These examples, unfortunately, are not isolated but rather are representative of numerous sites throughout the arid West where the Corps has employed its open-ended Migratory Bird Rule and related policies to claim regulatory authority over vast areas of ephemeral desert drainages.

The extent of the Corps's expansive claims is staggering. The Sonoran Desert as a whole, which encompasses the above and other similar projects, is over 200,000 square miles (128 million acres). Of this area, 6,200 square miles (3,968,000 acres) are located in Southern California. Desert washes are relatively common features in this landscape, encompassing approximately 10 percent of the total Sonoran Desert land area. It is estimated that between 317,440 and 396,800 acres of ephemeral washes occur within the Southern California portion alone of the Sonoran Desert. Consistent with the Corps's view of the Mesquite Landfill and the mining projects noted above, the Corps could assert jurisdiction over any project that could affect any portion of these washes – indeed it is difficult to imagine a project of any scope that would not affect them. In essence, the Corps sees itself as having jurisdiction over the entire desolate and typically waterless area.

SUMMARY OF THE ARGUMENT

The Corps's construction of the term "waters of the United States" is unreasonable and improper, in part, because it renders the key term "waters" superfluous. Under the Corps's interpretation of this statutory jurisdictional threshold, it is the presence of erosional features on normally arid landscapes, and the presence of certain plants and wildlife – not water – that purportedly triggers the Corps's Section 404 jurisdiction. The Corps has expanded its interpretation of the Clean Water Act in such a manner as to now claim jurisdiction over every area that contains not just

a body of water, but also any drainage or erosional feature where the Corps might, for example, find even some potential or temporary presence of a migratory bird or ESA-protected species. Of course, almost every erosional feature nationwide, no matter how dry or desolate, can be made to fit this extreme and improper interpretation of the language of the Clean Water Act.

Amici urge this Court to consider the Seventh Circuit opinion below in light of three points. First, this extraordinary result, where the Corps regulates projects in one of the driest regions on earth based upon the Clean Water Act, cannot be squared with the plain language of the Clean Water Act, yet it is a logical extension of the reasoning of the Seventh Circuit opinion. It cannot seriously be argued that Congress, in adopting the Clean Water Act, saw itself as conferring jurisdiction on the Corps to regulate nearly waterless stretches of desert landscape. Second, the opinion below failed to evaluate the practical effect of the Corps's claimed jurisdiction under the Clean Water Act and, therefore, improperly endorsed a jurisdictional approach that has significant potential to harm individuals and companies like *amici* through spurious regulation by the Corps. Third, in light of the manner in which the Corps has gradually expanded its definition of the term "waters of the United States," through a series of significant conceptual shifts, deference to the Corps's interpretation in this litigation would not be appropriate.

ARGUMENT

I. THE CORPS'S IMPROPERLY BROAD CONSTRUCTION OF THE CLEAN WATER ACT HAS LED THE CORPS TO REGULATE DRY DESERT WASHES AND OTHER ARID LANDS, DESPITE THE PLAIN LANGUAGE OF THE ACT.

The Army Corps of Engineers has gradually and improperly expanded its jurisdiction over "waters of the United States" in such a manner that now virtually every land area which drains or is crossed by water, even sporadically, falls within that claimed jurisdiction. The extremity of the Corps's view of its jurisdiction is illustrated by the experience of Arid and the members of the CMA in attempting to complete projects in remote regions of the desert, where the Corps, incredibly, has asserted that dry desert washes constitute "waters of the United States" subject to Section 404 jurisdiction.

A. The Corps Has Claimed Jurisdiction Over "Waters" That Contain No Water.

The experiences of these *amici* graphically illustrate that the approach taken by the Corps has resulted in the assertion by the Corps of jurisdiction over non-aquatic areas that is unreasonable and contrary to the meaning of the Clean Water Act. It is undisputed, for example, that the Mesquite Landfill site contains no wetlands, ponds, streams, or other water bodies. There is no surface water connection between the site and any wetland, pond, stream, or other water body. In fact, there is no water to be found in the site at all, except on a highly irregular and temporary basis. The only water-related features that exist in the site are hydrologically isolated dry washes, which temporarily transmit storm water.

In any year, these washes will hold water for only a few hours – perhaps only for a few minutes.

Just how does the Corps reach its determination that a dry desert wash is a "water of the United States," thereby claiming jurisdiction under the Clean Water Act? In arid areas like the Sonoran Desert, the answer has two components.

First, the Corps has concluded that erosional features in the desert landscape should be considered "waters" because they purportedly contain an "ordinary high water mark" or OHWM, even where the water that creates these features generally is present only during extremely rare and short storm events. Indeed, under the Corps's current regulations and policies, the jurisdictional extent of "waters of the United States" encompasses all areas displaying visible signs of water flow, extending laterally to OHWM, and upstream to that point where the OHWM is no longer perceptible. 33 C.F.R. § 328.4. The OHWM, in turn, is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area." 33 C.F.R. § 328.3. Thus, even though water generally is not present in the Sonoran Desert, the Corps asserts jurisdiction over dry washes in this area in part because, during the infrequent occasions when storm water run-off passes through, it erodes the dusty landscape in the prescribed manner, purportedly creating the requisite "high water mark." The problem with this approach, of course, is that there are virtually no drainage or erosional features, no matter how shallow or minor, that fail to meet this minimal "test," and indeed such erosional features can be created by just one or two storm events. Storm water run-

off flowing down the smallest gully or rivulet, no matter how briefly, will virtually always leave some mark of its passing.

Second, under the overbroad Migratory Bird Rule at issue in this case, the Corps has concluded that these dry desert wash "waters" are or could be a habitat for migratory birds that cross state lines, or that they are or could be a habitat for species listed as "threatened" or "endangered" under the ESA. Corps guidance documents have interpreted the Clean Water Act to include any waters that "*could be* used" by migratory birds or species listed under the ESA as regulated waters. Memorandum on Clean Water Act Jurisdiction Over Isolated Waters, from Brigadier General Patrick Kelly to District Offices, (November 8, 1985) ("Kelly Memorandum") (emphasis supplied).[3]

In a desert region, this interpretation does not require that surface water be present in the area at all. Water must be present, possibly solely below the surface, just often enough for plant communities to survive that "could" provide "habitat" for migratory birds passing through the area -- regardless of whether the birds in fact use the area as habitat (significantly, the phrase "could be" does not require that the Corps determine that the area in fact provides a habitat for migratory birds). In the case of the Mesquite Landfill, the Corps claims that the ephemeral desert washes that cross the site fall within this definition due to the presence within the washes of desert microphyll woodland and creosote bush scrub plant communities that could be used by birds that migrate through the Lower Colorado and Sonoran deserts. In addition, although the site is not "critical

[3] The Kelly Memorandum was set aside as in violation of the Administrative Procedure Act in an unpublished decision, *Tabb Lakes, Ltd. v. United States*, 20 Envtl. L. Rep. 20008 (4th Cir. 1989). EPA and the Corps have issued a joint memorandum stating that they will follow *Tabb Lakes* only within the Fourth Circuit.

habitat" as defined in the ESA, the desert tortoise (*Gospherus agassizii*) is known to occur there.[4]

These dry desert washes contain no water on even an infrequent basis, and they contain no unique resources that do not occur on thousands of acres of similar topography in this region. Yet, the washes and desert erosional features are sufficient, under the Corps's approach, to confer jurisdiction upon the agency. By this circuitous route, the Corps has reached the conclusion that it has Clean Water Act jurisdiction over a project undertaken in the most arid stretch of the American landscape. Using this reasoning and policies, the Corps could assert such jurisdiction over virtually any construction activity in this or similar desert regions.

B. The Assertion of Corps's Jurisdiction Offends Common Sense Expectations of Project Proponents.

The Corps's assertion of Clean Water Act jurisdiction, in the absence of water, is so offensive to common sense interpretations of the Act that it has wreaked havoc on projects in the desert regions where Arid and CMA's members have attempted them. During the first seven years of the permitting process for the Mesquite Landfill, for example, neither the Corps nor EPA asserted

[4] The Mesquite Regional Landfill site was not included in areas designated by the USF&WS as "Critical Habitat" and therefore was not included in designated "Desert Wildlife Management Areas" in the USF&WS Desert Tortoise Recovery Plan. The Landfill project incorporates numerous mitigation measures designed for conservation of the desert tortoise and its habitat, a key component of which is the acquisition of high quality "critical" desert tortoise habitat through a transfer of exchange and compensation lands from private into federal ownership.

that the project site contained "waters of the United States," even though the presence of desert tortoises and plant communities suitable for use by migratory birds was well known. In fact, the project had been the subject of regulatory approvals issued by EPA itself, as well as by the USF&WS. Moreover, the Mesquite Landfill had participated in an extensive land exchange with the federal government, in which the historically disturbed, low-quality tortoise habitat on federal lands was exchanged for high quality tortoise habitat on private lands, at the cost of millions of dollars to Arid. That federal land exchange was reviewed under NEPA and analyzed by the BLM, USF&WS, EPA, and other agencies.[5] Indeed, the federal district court upholding the land exchange associated with the project was compelled to remark,

> The exchange also has a positive impact on the environment by improving the biological integrity of the threatened desert tortoise population. BLM stands to acquire 3,656.1 acres of Category I Desert Tortoise Habitat to compensate for the loss of Category III Desert Tortoise Habitat (lower quality) within the Mesquite Regional Landfill Project.

Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430, 1440 (S.D. Cal. 1997) (currently on appeal before the Ninth Circuit, Case No. 97-55429).

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[5] The exchange was also challenged by an environmental group and upheld by a federal district court. *Desert Citizens Against Pollution v. Bisson*, 954 F. Supp. 1430 (S.D. Cal. 1997) (currently on appeal before the Ninth Circuit, Case No. 97-55429.)

At no time during this extensive federal permitting process did EPA, the Corps, or any other agency suggest that the dry desert washes within the site might constitute "waters of the United States" requiring an additional permit under Section 404. Similar to the instant case, only after all other regulatory approvals had been granted following six years of studies, the Corps suddenly and surprisingly claimed jurisdiction for the first time based solely on the erosional features of the landscape and the occasional presence of migratory birds and ESA species, although these drainages and creatures had already been the subject of intense regulatory attention.

One need not peruse exhaustively the text of the Clean Water Act to realize that this result cannot be squared with the plain language of the legislation, which nowhere suggests that the statute was to provide the Corps with jurisdiction over broad areas of essentially waterless landscape. Indeed, the oft-repeated purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. One might expect that if Congress had intended the legislation to restore and maintain the biological integrity of the Nation's deserts, it would have done so with express language. Not one word or phrase of the statute can be construed as providing such protection. Yet, this is precisely the result that the Army Corps has reached through steady expansion of its jurisdiction during the decades since the statute was enacted.

II. THE SEVENTH CIRCUIT FAILED TO EVALUATE THE PRACTICAL EFFECT OF APPROVING THE CORPS'S CLAIMED JURISDICTION OVER ISOLATED AND EPHEMERAL WATERS.

The opinion below failed to acknowledge the validity of Petitioner's claims that the approval of the Corps's broad assertion of jurisdiction over isolated waters would lead to the Corps possessing virtually unlimited jurisdiction. The Seventh Circuit correctly acknowledged that

> [t]he United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al., 191 F.3d 845, 850 (7th Cir. 1999). However, the Seventh Circuit then failed to carry this statement through to its logical conclusion, stating "any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point." *Id.*

This suggestion, which the Seventh Circuit apparently considered outlandish, has become the reality at the Mesquite Landfill Site and similar project sites in the western United States, where *the Corps already has asserted and will continue to assert jurisdiction over every "puddle" and dry wash.* Contrary to the expectation voiced in the Seventh Circuit's opinion, the Corps does *not* always make a factual determination that an area is actually used as habitat by migratory birds before asserting its jurisdiction. *See* 191 F.3d at 850; Kelly Memorandum (extending jurisdiction to

lands that "could be" habitat for migratory birds). Not only has the Corps sought to regulate every puddle that forms after a rainstorm, it has sought to do so in places like the Sonoran Desert, where puddles may only exist for a matter of hours, or in some cases merely minutes, out of each year. The Seventh Circuit simply failed to appreciate the scope of the jurisdiction the Corps already routinely asserts with respect to projects everywhere, including the deserts of the western states, or to compare the scope of this claimed jurisdiction with a reasonable construction of the Clean Water Act. The practical effect of the Seventh Circuit's decision will be continued regulation by the Corps of areas that are plainly beyond the reach of the Clean Water Act and which are more appropriately regulated by other federal and state agencies.

III. *CHEVRON* DEFERENCE IS INAPPROPRIATE WHERE THE CORPS'S LEGAL POSITION HAS CONTINUALLY SHIFTED OVER TIME.

An agency's construction of a statute it is charged with enforcing is normally entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, in the instant case this is not appropriate, because (1) the Corps's definition of "waters of the United States" arises from the judicial opinion issued in *Callaway*, and not the Corps's expert interpretation of the Clean Water Act; and (2) the Corps has shifted its definitional framework several times in the years since the *Callaway* decision, and has gradually expanded its jurisdiction through this process beyond any reasonable construction of the Clean Water Act. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (deference does not extend to "agency litigating

positions that are wholly unsupported by regulations, rulings, or administrative practice").[6]

The Corps's original interpretation of the Clean Water Act limited its jurisdiction to waters that were actually used in navigation or were susceptible to use to transport interstate or foreign commerce. 42 Fed. Reg. 37122, 37123 (July 19, 1977) (summarizing early history of Corps's interpretations of its jurisdiction). In *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), the Corps and the United States argued that the Corps's regulatory jurisdiction was limited to these traditionally navigable waters. *Callaway*, however, held that Congress intended the definition of waters of the United States to have the maximum scope that the Commerce Clause would allow. *Id.* at 686. The Corps chose not to appeal this district court opinion. Taking this direction from *Callaway*, the Corps issued interim final regulations in 1975 that redefined "waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. at 31320 (1975).

In practice, however, even this "second generation" interpretation by the Corps of "waters of the United States" retained some requirement of a physical or hydrological connection between a body of water and truly navigable water in order to support jurisdiction. For example, the Corps initially defined a "freshwater wetland" subject to its jurisdiction as an area that was "adjacent to" a regulated

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[6] In ancient Rome, according to Dio Cassius, the Emperor Caligula was said to have tormented Roman citizens by printing obscure laws at the top of tall columns, and then punishing unsuspecting citizens who failed to comply with them. Blackstone, Commentaries on the Laws of England, 1765-69, Vol. 1, Introduction, Section II. The Corps has accomplished a modern version of this unfair practice.

body of water. 42 Fed. Reg. at 37123 (July 19, 1977). *See Riverside*, 474 U.S. 121 (upholding regulations). The rationale behind extending the definition to include these connected waters was that "[w]ater moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system." *Riverside*, 474 U.S. at 134, *quoting* 42 Fed. Reg. at 37128. Thus, water that was not itself navigable or usable in interstate commerce fell within the Corps's jurisdiction only if dredge and fill activities in that water affected, or had potential to affect, the quality of water that was navigable or usable in interstate commerce. This Court upheld this definition because the Court could not state that the definition was unreasonable. 474 U.S. at 134.

As in many things, this interpretation took on a different shade of meaning in the arid stretches of the American West, where the Corps successfully argued in a number of reported decisions that any area that formed a surface water connection, if only on a seasonal or intermittent basis, with a water that was navigable in fact constituted a water of the United States, even if the upstream area was typically dry. *See, e.g., Quivira Mining Co. v. United States Environmental Protection Agency*, 765 F.2d 126, 130 (10th Cir. 1985) (normally dry arroyos are "waters of the United States" where they are tributary to navigable water); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975) (same). These decisions represent a significant stretch of the Corps's jurisdiction beyond the concern of the Clean Water Act with protecting the nation's waters because the probability that the tributary arroyos considered in these decisions could actually affect the quality of the nation's waters was exceedingly small. Certainly, dry arroyos are one step removed from the wetlands upheld as

waters of the United States in *Riverside Bayview Homes*. However, these decisions, citing deference to the Corps's expertise, approved this extension as a reasonable one. As described in the factual backgrounds above, the Corps recently has gone well beyond these suspect cases by now claiming jurisdiction over even *non-tributary* dry washes and arroyos.

Contemporaneously with this Court's opinion in *Riverside Bayview Homes*, the Corps, through the Kelly Memorandum in 1985 and a preamble to a Notice of Final Rule in 1986,[7] began a still-more ambitious expansion of its jurisdiction through the Migratory Bird Rule. Though cast as a "clarification" of existing policy, 51 Fed. Reg. at 41217, the Migratory Bird Rule represented a major conceptual shift away from the rationale that certain waters deserved the protection of the Corps because of their potential to affect the quality of interstate waters or waters that were susceptible to use in interstate commerce. The dry desert washes the Corps now regulates pursuant to the migratory bird rule are fundamentally different from the arroyos and intermittent streams addressed in reported judicial decisions such as *Quivira Mining*, because the water bodies in those cases were tributary and flowed directly into other waters of the United States.

The result of this expansion has been that over a period of nearly thirty years, the Corps has gradually pushed the boundaries of its jurisdiction ever outward, moving from (1) waters which were navigable in fact to (2) waters (usually wetlands) that were hydrologically connected to interstate waters, and from there to (3) its present position, where the Corps now routinely asserts jurisdiction over land areas that typically contain no water, that have no physical connection to navigable waters, and where the presence of

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7 51 Fed. Reg. 41206 (November 13, 1986).

water is both isolated and ephemeral. The Corps's present construction of the term "waters of the United States" is now conceptually separated from any concern with water quality. Now, the rationale in support of the Corps's jurisdiction rests upon the presence of migratory birds or endangered species that "could" make use of a particular area of land, whether that land typically contains any water or has any hydrologic connection to permanent waters. The Corps's assertion of Section 404 jurisdiction in these areas amounts to a claim that virtually every land area over which water ever flows constitutes jurisdictional waters. This result is plainly unreasonable and should not be tolerated by this Court.

CONCLUSION

The Army Corps of Engineers has extended its jurisdiction well beyond the bounds of any reasonable construction of the Clean Water Act, as is illustrated by the Corps's claim of Section 404 jurisdiction over dry desert washes and erosional features in the California Sonoran Desert and similar arid regions of the country. The Corps's insidious expansion of its jurisdiction has occurred through successive reinterpretations of the otherwise plain phrase "waters of the United States." This Court should reject this approach and should not be misled by the apparent significance of the waters at issue in the instant case. Because the opinion below failed adequately to appreciate the extent of the jurisdictional grant it was approving, that opinion is deeply flawed and should be reversed or limited so that "waters of the United States" better comports with the text and meaning of the Clean Water Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS ET AL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether the federal government exceeds its constitutional authority to "Regulate Commerce Among the States" when it exercises what is essentially a police power to assert regulatory jurisdiction over isolated intrastate waters solely because those waters serve as habitat for migratory birds.

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N. L. R. B. v. *Jones & Laughlin Steel Corp.*,
301 U.S. 1 (1937) 17-18

New York v. *United States*, 505 U.S. 144 (1992) 3-5

Oregon Waste Systems, Inc. v. *Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994) 15

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 15

Printz v. *United States*, 521 U.S. 898 (1997) 3, 21

Seminole Tribe of Florida v. *Florida*,
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Solid Waste Agency of Northern Cook County
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South Carolina v. *Georgia*, 93 U.S. 4 (1876) 20

South Covington & C. St. R. Co. v. City of Covington,
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The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) 20

The License Cases, 46 U.S. (5 How.) 504 (1847) 13

United States v. *Chicago, M., St. P. & P. R. Co.*,
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United States v. *E. C. Knight Co.*,
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United States v. *Lopez*, 514 U.S. 549 (1995) ..... passim

United States v. *Morrison*, 120 S. Ct. 1740 (2000) .. passim

United States v. *Riverside Bayview Homes, Inc.*,
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United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) ... 23

Virginia v. *Tennessee*, 148 U.S. 503 (1893) 22

West Virginia ex rel. Dyer v. *Sims*,
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Wickard v. *Filburn*, 317 U.S. 111 (1942) 23-25

Constitional Provisions, Statutes, and Regulations

33 C.F.R. § 328.3(a)(3) 20
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U.S. Const. Art. I, Sec. 10, cl. 3 22
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U.S. Const. Amend. XI 3, 4

Miscellaneous

B. Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317 (1992) 24
R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987) 24
R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) 24
Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), reprinted in 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) 5
R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) 24

The Federalist No. 22 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) 5
The Federalist No. 28 (Hamilton) (J. Cooke ed. 1961) 9
The Federalist No. 33 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) 9
The Federalist No. 39 (Madison) (C. Rossiter & C. Kesler eds., 1999) 7
The Federalist No. 42 (C. Rossiter ed. 1961) 5
The Federalist No. 45 (Madison) (C. Rossiter & C. Kesler eds., 1999) 7, 9
The Federalist No. 47 (Madison) (C. Rossiter & C. Kesler eds., 1999) 6
The Federalist No. 51 (Madison) (C. Rossiter & C. Kesler eds., 1999) 6, 9
L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 Tex. L. Rev. 719 (1996) ... 24
G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997) 25
C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247 (1996) 24
L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1 (3d ed. 2000) 24
James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), reprinted in 1 THE FOUNDERS' CONSTITUTION 62 (P. Kurland & R. Lerner eds., 1987) . 7
James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), reprinted in 2 J. WILSON, THE WORKS OF JAMES WILSON 770 (Robert Green McCloskey ed., 1967) 6

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS ET AL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that We the People delegated to the national government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers*.

In order to further advance its mission, the Claremont Institute in 1999 established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases such as this that involve issues of Constitutional significance going to the heart of the founding principles of this nation. The Center for Constitutional Jurisprudence has previously participated as amicus curiae before this Court in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), *Boy Scouts of America* v. *Dale*, 120 S. Ct. 2446 (2000), and *California Democratic Party* v. *Jones*, 120 S. Ct. 2402 (2000).

The Claremont Institute, through its Center for Constitutional Jurisprudence, seeks to elaborate on the arguments that have been made by Petitioner regarding the scope of the power delegated to Congress under the Commerce Clause. The

Claremont Institute believes that its scholarly expertise about the theoretical and historical origins of the American constitutional system of government will aid this Court in evaluating whether the assertion of jurisdiction made by the Army Corps of Engineers over wholly intrastate waters merely because of the sometime presence of migratory birds exceeds Congress's authority to regulate commerce among the states.

SUMMARY OF ARGUMENT

Over the past decade, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. CT. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. CT. 2199 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Morrison*, 120 S. Ct. 1740, 1753 n.7 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995).

And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In interpreting the federal Clean Water Act to cover waters which are or would be used by migratory birds which cross state lines, the United States Army Corps of Engineers has taken the statute well beyond the constitutional bounds of the Commerce Clause. The Corps' efforts to regulate any intrastate pond where migratory birds happen to alight is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the Commerce Clause as broadly as the Corps does here is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially preempting land use decisions of all 50 states and their thousands of municipal subdivisions, the Corps has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look like child's play.

ARGUMENT

I. In Interpreting the Clean Water Act to Cover Waters Utilized by Migratory Birds, the Corps Has Ignored the Principle of Enumerated Powers, a Principle Which the Founders Believed to Be Essential to Liberty.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See, e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S., at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting The Federalist No. 42, p. 267 (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See, e.g., Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who wrote the Constitution as well as the citizens of the member States of the

Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see*, *e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 J. WILSON, THE WORKS OF JAMES WILSON 770 (R. McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See*, *e.g.*, THE FEDERALIST NO. 39, at 256 ((noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.)

("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory*, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); Art. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.), at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458); *see also Morrison*, 120 S. Ct., at 1753 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power" (citing *Arizona* v. *Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Gregory*, 501 U.S., at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S., at 572 (Powell, J., dissenting))); *Garcia*, 469 U.S., at 582 (O'Connor, J., dissenting) ("This division of authority, according to Madison, would produce efficient government and

protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 582 (quoting *Gregory*, 501 U.S., at 458); *Gregory*, 501 U.S., at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S., at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id.*, at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.*, THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects

which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—the granting of land use permits and the regulation of wholly intrastate waters—are within the core of the police powers reserved to the states or to the people.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 19-20, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.), at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts, as interpreted by the Corps of Engineers, to link the vintage exercise of the state police powers at issue here to its power to regulate interstate commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the interpretation of the

Clean Water Act propounded by the Corps of Engineers is not the law of the land.

II. The Migratory Bird Rule Is Neither a Regulation of Commerce Nor a Necessary and Proper Means of Giving Effect to a Regulation of Commerce.

A. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade.

In upholding the Corps' "migratory bird rule" interpretation of the Clean Water Act, the Seventh Circuit Court of Appeals made a telling conflation of terms that demonstrates just how far removed from the Founders' conception of the Commerce power the Corps' claim really is. The Clean Water Act, as interpreted by the Corps to cover wholly intrastate waters visited on occasion by migratory birds, is a permissible exercise of Congress's power to regulate commerce among the states, noted the Seventh Circuit, because "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," and some of those people travel across state lines to do so. 191 F.3d, at 850 (quoting *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993).[2]

For the Founders, "commerce" was trade, not spending by people who happen to have crossed state lines. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823)

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[2] We note that under the Court of Appeals' rationale, it would appear that the Corps of Engineers has been too stingy with its jurisdictional claims. The birds need not travel across state lines for the Corps to have jurisdiction, apparently, as long as some bird watchers travel across state lines to observe them. Thus, under the Seventh Circuit's rationale, the "migratory" part of the "migratory bird rule" is really unnecessary; indeed, the "bird" part of the rule would also appear to be unnecessary, since land-based critters, which are equally dependant on "waters," are also hunted, trapped and observed, sometimes by people who travel across state lines.

(Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S., at 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield*, 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 120 S. Ct., at 1753). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate other kinds of business activity such as hunting or trapping (assuming that the hunting and trapping referenced by the Court of Appeals was for business rather than recreational purposes), therefore, was completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power to make land use regulations governing wholly intrastate waters because those waters are used by migratory birds, which

might be hunted, trapped or observed by people, some of whom might have traveled across state lines, would have been beyond the pale.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as hunting and trapping), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)); *Baldwin* v. *Fish and Game*

Comm'n of Mont., 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government....

156 U.S., at 13; *see also Carter Coal*, 298 U.S., at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S., at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id.*, at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a

> portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id.*, at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the interpretation of the Clean Water Act at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. The Solid Waste Agency of Northern Cook County seeks to dispose of non-hazardous waste generated by various communities in Northern Illinois, not from other states. Interstate "commerce" in garbage is therefore not at issue, even if such commerce could serve as the basis for regulation of the waste disposal site itself (as opposed to the actual shipment of or disposal fees for the garbage). *Cf. Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994).

In order to perform its proposed task, SWANCC will need to fill approximately 17.6 acres of ponds that have formed on a former gravel pit. The ponds are not part of the channels of interstate commerce, because they have no connection to any navigable waters of the United States. They are, instead, merely a part of the land, land that is wholly located within the

State of Illinois. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, some migratory birds have apparently taken a fancy to SWANCC's puddles since the gravel pit closed, but while migratory birds may become articles of commerce once they are captured, *see, e.g.*, *Bailey* v. *Holland*, 126 F.2d 317 (4th Cir. 1942), they are not articles of interstate commerce when they nest, feed or bathe in navigable waters, much less when they utilize wholly intrastate ponds and puddles. They are not articles of interstate commerce when they propel themselves across state lines. And they are not even articles of interstate commerce—under the original view of the clause —when they are hunted and trapped, even if the hunter or trapper intends subsequently to ship the captured birds in interstate commerce. *Cf. E.C. Knight Co.*, 156 U.S., at 12; *Kidd*, 128 U.S., at 20.

Nor does the Court of Appeals' recitation of Census Bureau statistics about the money spent by interstate-traveling hunters support the regulation at issue here under the Necessary and Proper Clause. *See, e.g., Morrison*, 120 S. Ct., at 1751.[3] As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.), at 324 (describing the Necessary and Proper Clause as merely a means clause).

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[3] Were it otherwise, the fact that millions of people spend a whole lot of money traveling to be with relatives for Thanksgiving dinner would give the federal government authority under the Commerce Clause to regulate the family relationships that give rise to all that traveling. The absurdity of the exercise of power in the one case is as patent as it is in the other. *Cf. Lopez*, 514 U.S., at 564; *Morrison*, 120 S. Ct., at 1751.

There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4 Wheat.), at 423.[4] Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case. Indeed, it is hard to imagine a regulation more removed from the Commerce Clause power, as originally understood, than the interpretation of the Clean Water Act put forward by the Corps of Engineers here.

B. Even under the expanded view of the Commerce Clause taken in this court's modern-era precedents, the migratory bird rule exceeds the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to

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[4] Indeed, the whole Clean Water Act, and not just the expanded interpretation propounded by the Corps of Engineers that is at issue here, is arguably unconstitutional pretext. Ensuring the navigability of the nation's waters would be a Commerce Clause purpose, but that is not what the Clean Water Act purports to do. *See infra*, at 19-20.

embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 120 S. Ct., at 1749). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison,* 120 S. Ct., at 1753 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*. *See Lopez*, 514 U.S., at 566; *Morrison*, 120 S. Ct., at 1748-49. As in those cases, the interpretation of the Clean Water Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Instead, the Court of Appeals based its decision on the claim that the filling of some ponds upon which migratory birds happen to light on occasion would in the aggregate have a "substantial effect" on interstate commerce because the filling of all such ponds would eliminate the habitat for migratory birds, which in turn would cause a decline in the migratory bird populations, which would in turn supposedly result in fewer people traveling across state lines to hunt, trap and observe the migratory birds, which would in turn cause a decline in expenditures made by such traveling bird hunters and bird watchers, which would amount to a substantial effect on interstate commerce. *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). Quite apart from the fact that each step of the lower court's logical syllogism is fatally flawed,[5] merely repeating the syllogism demonstrates

[5] There is no evidence, for example, that the filling of some ponds would lead to the filling of all ponds. Indeed, practical experience suggests just the opposite; as natural habitats become more scarce, communities tend to become more vigorous in their protection of remaining habitats, and (continued...)

that the Court of Appeals has piled "inference upon inference" to squeeze a police power purpose into a commerce clause box. *See Lopez,* 514 U.S., at 567. As this Court has made clear, that box just does not hold the water that the Corps of Engineers would like to regulate here. *Id.* (rejecting an "inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison,* 120 S. Ct., at 1752-53.

In short, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the interpretation of the Clean Water Act proffered by the Corps of Engineers remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The statute enacted by Congress does not actually pretend otherwise. Its express purpose is not to insure the navigability of the nation's waterways—a proper commerce clause purpose —but is rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—a clear police power purpose. *See* 33 U.S.C. § 1251(a).

If the statute merely prohibited the discharge into navigable waters of dredged or filled material, or other pollutants that could reasonably threaten navigability, the law would be both a necessary and a proper means to further Congress's powers under the Commerce Clause, because such discharges could

[5] (...continued)
migratory birds are pretty adept at finding new habitats (just as they found the SWANCC ponds that formed on the abandoned gravel pit). And even if the filling of SWANCC's ponds could possibly cause a decline in the migratory bird populations, one might just as readily assume that travel by bird watchers intent on observing the remaining migratory bird populations would increase rather than decrease.

threaten navigation.[6] But the statute prohibits the discharge of "any pollutant," not just dredged or filled material or other pollutants that would threaten navigability. 33 U.S.C. § 1311. And, under the Corps' interpretation, it prohibits the discharge of fill even in intrastate "mudflats, sandflats, wetlands, sloughs, prairie potholes," etc., waters having no connection whatsoever with navigable waters, demonstrating that water quality, not navigability, was Congress's chief concern. 33 C.F.R. § 328.3(a)(3); *see also* 33 U.S.C. § 1251(a). That is a police power purpose, and reliance on the Commerce Clause power is mere pretext for its exercise.

As the facts of this case make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see, e.g., South Covington & C. St. R. Co. v. City of Covington*, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing

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[6] This is true even under the statutory definition of "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). "The waters of the United States" is both broader and more narrow than "navigable waters," from a commerce clause perspective. The phrase is broader because "waters" would seem to include non-navigable waters, which could be reached by Congress under the Necessary and Proper Clause (rather than the Commerce Clause directly), *if* regulation of such waters was both necessary and proper to further Congress's Commerce Clause powers. Hence, this Court's holding in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35 (1985), that Congressional power extends to wetlands that are adjacent to, and thereby affect, navigable waters. The phrase is narrower because the clause "of the United States" has historically excluded waters that are wholly within a single state. *See, e.g., Miller* v. *City of New York*, 109 U.S. 385, 395-96 (1883) ("by 'navigable waters of the United States' are meant such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states" (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)); *South Carolina* v. *Georgia*, 93 U.S. 4, 10 (1876) (describing the navigable waters of the United States as those "which are accessible from a State other than those in which they lie"); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596 (1941) (same).

concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See, e.g., Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of some puddles, formed in the trenches left in an abandoned gravel pit and about which some migratory birds have been observed, is pitted against the necessity of disposing of the non-hazardous waste produced by some 700,000 people in a environmentally sensitive yet cost-effective way. *See* Petn., at 5. Because of the well-known NIMBY ("not-in-my-back-yard") syndrome, siting of a landfill is almost an impossible political task, but the people in the 23 Northern Illinois communities that formed SWANCC have done it. Moreover, they did so after extensive consideration of the ecological issues, obtaining approval of the local zoning board and Cook County Board of Commissioners after ten public hearings and 2,500 pages of testimony, and receiving a permit from the Illinois Environmental Protection Agency after submitting a 1,700 page application and undergoing another four days of hearings. Petn., at 5.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g., Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S. CT. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. CT. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. CT. 2199 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the Corps' interpretation of the Clean Water Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its

police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 120 S. Ct. 1740 (2000); *Missouri* v. *Illinois.*, 180 U.S. 208 (1901). Even for waters that touch upon two or more States, the States remain free to enter into agreements to regulate the waters to their mutual benefit. *See, e.g., Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const., Art. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Northern Illinois provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the people of Northern Illinois. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the Corps and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

C. The aggregation principle of *Wickard* v. *Filburn* should be repudiated, in order to remove from Congress and the regulatory agencies the remotely colorable claim to unconstitutional assertions of power that it provides.

More fundamentally, the decision by the Court of Appeals below demonstrates just how pernicious the combination of the aggregation principle from *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), and the substantial effects test discussed in *Lopez* really is. Standing alone, the substantial effects test essentially converts the Necessary and Proper Clause from a means clause to an ends clause, and therefore renders it constitutionally suspect. *See Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring); *M'Culloch*, 17 U.S. (4 Wheat.), at 423; *Carter Coal*, 298 U.S., at 317 (Hughes, C.J., separate opinion). But when combined with *Wickard*'s aggregation principle, there is absolutely nothing over which clever lawyers and bureaucrats in federal regulatory agencies cannot stake some claim of regulatory power, as this case amply demonstrates.

Striking down the Corps' migratory bird rule here is not enough. *Lopez* has been on the books for five years, yet the Corps (as well as countless other federal agencies) has persisted in asserting jurisdiction where, under any reasonable reading of *Lopez*, it has none. It has persisted despite a ruling by the Fourth Circuit Court of Appeals holding the regulation invalid, because it knew that it could, and did, find sympathetic courts willing to treat *Lopez* as mere anomaly rather than constitutional principle and to accept the Corps' contorted, inference-upon-inference arguments, made remotely colorable by the lingering vitality of the *Wickard* aggregation principle. Compare *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), with the Ninth Circuit's decision in *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom., Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995); *see also Morrison*, 120 S. Ct., at 1750 n.4 (noting that the dissenters in the case

would apparently cast *Lopez* aside). And, as the *amicus curiae* brief by the Pacific Legal Foundation in support of the petition made clear, the Corps has even continued to assert jurisdiction based on the migratory bird rule in the Fourth Circuit, secure in the knowledge that the mere assertion of jurisdiction would force landowners into the extensive and costly section 404 permitting process (lest they risk criminal prosecution), and that once there, the Corps had the ability to "basically bleed a client to death financially," preventing in most cases any challenge to the initial improper assertion of jurisdiction. PLF Br. in Support of Petition, at 22, 26-32.

The potential for such unlimited and abusive assertions of power is the reason that many constitutional scholars over the past half century have criticized *Wickard* as extra-constitutional, even those who favor the resulting expansion in federal powers. *See, e.g.*, R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 148-51 (1987); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 56-57 (1990) (explaining that *Wickard* "abandoned" aspects of the Constitution that defined and limited national power); R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) (contending that *Wickard* was a "manifestly erroneous" decision that left "no conceivable stopping point for the federal commerce power"); L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 Tex. L. Rev. 719, 745 (1996) (referring to *Wickard* as a "notorious" decision); C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 253 & n.18 (1996) (describing *Wickard* as a "repudiation" of the original Constitution that gave the national government "something close to general police powers"); B. Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317, 322, 324 (1992) (describing *Wickard* as a "wrenching break with the constitutional past," ringing the "death-knell for traditional notions of limited national government"); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, p. 831 n.29 (3d ed. 2000) (describing hypothetical "sham"

legislation that could result from the combination of the substantial effects test and the aggregation principle); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 191 (13th ed. 1997) (suggesting that *Wickard* "in effect abandon[ed] all judicial concern with federalism-related limits on congressional power"). The expansion of federal power that has followed on the *Wickard* decision and the concomitant retraction of liberty, not just in this arena but in numerous others, suggests that the time is long overdue for a reversal of that decision. *See Lopez*, 514 U.S., at 585 (Thomas, J., concurring). As the Corps' own actions in this case demonstrate, nothing short of a full repudiation of that decision will suffice to rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit should be reversed. The Corps of Engineers' migratory bird rule should be invalidated. And the aggregation principle of *Wickard* v. *Filburn*, which provided a remotely colorable basis for the Corps' assertion of jurisdiction over wholly intrastate puddles, should be repudiated.

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IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATE OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICUS* INTEREST

The State of Alabama, it should come as no surprise, takes seriously its obligation to ensure that the wildlife and wetlands its residents enjoy today remain preserved, if not indeed improved, for future generations. The people of the State demand no less.

The residents of other States share this view, as the actions of their State and local governments well attest. The States have been anything but idle in acting as responsible guardians over these essential environmental matters. *See* Appendix. Whether securing the interests of future bird watchers, future hunters, or myriad interest groups in between, the States have been diligent in protecting both interstate and intrastate wildlife and the diverse habitats they need to survive.

Why, then, does Alabama support a challenge to the migratory bird rule, whose only offense is one of jurisdiction and not of substance? In the State's view, it is precisely such well-meaning measures that risk destroying an even-greater heritage that today's government leaders have a duty to preserve and pass on—the unique benefits of divided and dispersed government. A national power to regulate in this area is not only a power to preempt but also a power to confuse. Once obtained, federal jurisdiction over these matters would authorize a federal agency to preempt all manner of local measures, thereby destroying the creative and sometimes competitive efforts of States to develop more progressive initiatives, while at the same time authorizing even the most well-intentioned federal agency to sow confusion in the people over who has plenary accountability regarding these local land-use matters. One need not be a student of, or participant in, government for long to recognize the risks of clouding responsibility over a public policy issue. Irresponsible officials like nothing more than a lack of accountability for their actions; and responsible officials have no use for policy initiatives that

they cannot control and ultimately assume well-deserved credit for developing.

It is not lost on the State that judicially enforcing these requirements of American federalism comes with a short-term cost. Congressional efforts to protect religious liberties, *City of Boerne v. Flores*, 521 U.S. 507 (1997), to regulate guns in the vicinity of schools, *United States v. Lopez*, 514 U.S. 549 (1995), to regulate the disposal of nuclear waste, *New York v. United States*, 505 U.S. 144 (1992), to provide money-damages relief for overtime work, *Alden v. Maine*, 527 U.S. 706 (1999), and to provide civil remedies for victims of gender violence, *United States v. Morrison*, 120 S. Ct. 1740 (2000), all have been reined in by the constitutionally-required balance between the dual sovereigns and the enduring check of judicial review. Yet, it is worth emphasizing, not one public-policy vacuum has emerged in any of these areas in the aftermath of these decisions. Nor does any such problem loom on the horizon. All that has become clear is that the States and their local governments retain primary initial authority over these areas, a development that ensures local accountability and what comes with it—the best long-term prospects for responsible government. Neither does a single one of these decisions permanently remove the federal backstop. Whether under section 5 of the Fourteenth Amendment or the Commerce Clause, the National Government remains available for matters that are truly national in scope at the outset or that become so if and when the States reveal an inability to handle them.

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The libertarian objective of the Framers after all was to "split the atom of sovereignty," *Saenz v. Roe*, 526 U.S. 489, 504

n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), not to multiply it. While it is assuredly difficult to uphold this federalist abstraction—even when it is the Framers' abstraction—in the face of concrete laws to remove guns from schools, to remedy gender violence or to protect migratory birds, it is doubtful whether any other branch of government is equipped to do so. For the purpose of advancing these views and of developing them further, the State of Alabama respectfully submits this *amicus curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

1. In promulgating the migratory bird rule, the Army Corps of Engineers assumed a power that Congress did not delegate to it. When it passed the Water Pollution Control Act of 1972 (the Clean Water Act), Congress gave the Corps authority to regulate just "navigable" "waters of the United States." 33 U.S.C. § 1344, 1362(7). Settled interpretations of "navigable waters," statutory context, and vital presumptions against legislatively altering the Federal-State balance all confirm that the Corps' regulatory authority under the Clean Water Act extends to waters that are in actuality navigable, that would be navigable with modest effort, or that are close to or support such waters.

The migratory bird rule, as applied to remote, man-made ponds ranging from a few inches to a few feet deep, vastly exceeds this delegation of authority. In deciding that it could enforce its permitting requirement for discharges into any body of water that is or could become a habitat for migratory birds, the Corps took on a range of authority that it is doubtful any prior agency has tried to shoulder before. As most homeowners know, migratory birds may land just about anywhere and for any reason. Under the Corps' rule, it follows, all one needs is a backyard depression or the smallest of ponds to attract such birds in spring or fall, through no

particular effort by the homeowner, and potentially to violate a criminal law the next time grass clippings or leaves are inadvertently dumped there. An attempt to delegate such sweeping authority must be clearly stated. It was not, and the rule accordingly exceeds the Corps' authority.

2. In the event Congress did in fact delegate this astonishing authority to the Corps, the National Legislature overstepped its commerce power in doing so. An effort to regulate every isolated, temporary collection of water in the country has far too distant a connection to national commerce to be treated as a permissible regulation of intrastate activities that substantially affect interstate commerce. Every measure of constitutional excess appears in full force here.

No congressional findings, as an initial matter, support the claim that the activity substantially affects interstate commerce. From all that appears in the legislative record, Congress never discussed or seemed to have any sense that it was asserting this unique authority. Nor may after-the-fact justifications for this assumption of power (*i.e.*, bird watchers and hunters travel in and support interstate commerce) correct this deficiency. They are precisely the kinds of attenuated connections to national commerce that the Court has rejected in the past because they have no limiting principle and would convert the Federal Government from one of limited to one of uncontained powers. The interstate justifications for asserting power (again, bird watching and hunting) also are non-economic in nature—a type of justification that the Court has never accepted in this area before. The law, moreover, does not contain a limiting interstate-jurisdictional element. And, as with *Lopez* and *Morrison*, the law attempts to regulate an area traditionally covered by the States' general police powers. In the last analysis, while Congress may well possess power to regulate many of the activities it attempted to regulate here, it failed to employ constitutionally acceptable means in this instance.

ARGUMENT

At the outset, it may be useful to clarify the parameters of dispute. Neither Alabama as *amicus curiae* nor petitioner argues that the Constitution's limited and enumerated powers disable Congress from regulating wetlands in general or migratory birds in particular. On the contrary, the National Legislature has broad powers at its disposal to do so; they simply were not permissibly invoked in this instance. Congress may, for example, use its carrot-and-stick Spending Clause powers to regulate migratory birds and wetlands. *See North Dakota v. United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). It may use its uniquely wide-ranging Treaty Clause powers, which have in fact been properly invoked to regulate migratory birds. *See Missouri v. Holland*, 252 U.S. at 430-31, 435. And, most customarily, it may use its broad Commerce Clause powers to regulate waters that in fact flow interstate or are reasonably connected to such waters, or likewise may do so with regard to commercial transactions involving animals. *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed").

Not one of these legitimate powers, however, was legitimately invoked here. And, for that reason, the migratory-bird rule must be invalidated—either because it exceeds the regulatory authority properly delegated to the Army Corps of Engineers or because as applied it exceeds Congress's authority. In either event, neither the most ardent bird-watcher nor the most aggressive hunter need be alarmed. Not only have the States understandably shown the utmost solicitude in protecting these interests, *see* Appendix, but Congress continues to have broad means at its disposal to reach these important ends.

I. The Clean Water Act Does Not Give The Corps Authority To Regulate Isolated, Intrastate Waters Merely Because They Provide A Potential Or Actual Habitat For Migratory Birds.

A careful review of the terms of the Clean Water Act together with its legislative record confirm what a brief glance at the two suggest: Congress did not engage in the debate that the Court is officiating now. At no point did the National Legislature offer any meaningful indication that the Act would delegate such free-ranging authority to the Corps, and at no point did Congress consider the constitutional implications of permitting an agency to regulate every remote intrastate body of water where birds do or may alight.

Consider initially the text of the Clean Water Act. It just gives the Corps jurisdiction over "navigable waters," 33 U.S.C. § 1344, a grant of authority that hardly suggests a desire to regulate the shallowest and most temporary of intrastate ponds. Lewis would never have directed Clark to meet him at the first "navigable water," then looked for him at every passing pond. The phrase of course suggests just the opposite, as case after case construing "navigable waters" has indicated in a series of decisions announced by this Court before Congress enacted the Clean Water Act. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971); *Railroad Co. v. Maryland*, 88 U.S. 456, 470 (1874); *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("navigable waters" refers to waters that "are navigable in fact" and that are "susceptible of being used, in their ordinary condition, as highways for commerce"); *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940) (indicating that phrase covers not only waters that are navigable in fact but also that could reasonably be made navigable through improvements). When "judicial interpretations have settled the meaning of an existing statutory provision," it has long been clear, "repetition of the same language in a new statute indicates, as a general matter, the

intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). This time-tested principle of interpretation cannot coexist with the Corps' utterly-novel and exceedingly-expansive construction.

Neither does the Act's definition of the phrase "navigable waters" fairly advance the Federal Government's position. It says that the phrase covers the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The definitional phrase ultimately suggests three readings of "navigable waters," only one of which makes interpretive sense. One, the phrase could cover any "water" in the country at all, from Lake Erie to a backyard bird bath. Two, the phrase could mean whatever the Constitution permits, which is to say it reaches the full extent of Congress's Commerce Clause powers—a line that does not pick up dead-on-arrival hypotheticals, just whatever else the Court (as opposed to Congress) decides. Three, the phrase could cover waters of the United States that are navigable in fact, that could be navigable with reasonable modification or that are reasonably connected to such waters.

The first possibility is undoubtedly an untenable one. It would read the most conspicuous jurisdictional term in the statute—"navigable"—out of the provision entirely, and would certainly raise grave and doubtful questions concerning the constitutionality of this essential piece of national legislation. *See Jones v. United States*, 120 S. Ct. 1904, 1911 (2000).

The second possibility—jurisdiction extends to whatever the Court permits—suffers from some of these problems, and more. It, too, removes "navigable" from the interpretive question. That not only violates the above interpretive principles but conventions of everyday speech as well. A definition clarifies or limits a phrase; it does not dramatically expand the phrase. This interpretation also destroys any presumption of constitutionality. No branch of government

deserves respect over an inquiry—here the reach of Commerce Clause authority—that it consciously refused to make in the first instance. This interpretation also violates the cardinal rule that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). The Federal Government seeks here exactly the opposite presumption: When Congress is silent about the jurisdictional reach of a statute over local matters, or at most speaks inscrutably about it, the legislature wishes the Court to assume that everything Congress may do, it in fact did. And this interpretation fails to respect Congress's very own proclamation in the statute. "It is the policy," the statute says, "of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

That leaves the third and most straightforward interpretation. Consistent with prior constructions of the relevant terms and consistent with the above interpretive rules, the Corps' jurisdiction remains linked to waters that are "navigable" and are "of the United States," which includes waters that are navigable in fact, that may be navigable with reasonable effort or that are reasonably connected to either of the two. This respects all of the words in the statute, comports with each of the above rules of interpretation, and avoids a serious constitutional question. *See Jones*, 120 S. Ct. at 1911.

Nor does *Chevron* deference apply here. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory ambiguity that triggers administrative deference comes at the end, not the beginning, of the statutory inquiry—which is to say, *after* the application of the above rules of statutory construction. *See Chevron*, 467 U.S. at 843 n.9. Applied here, those rules eliminate the discretion-giving ambiguity that lends *Chevron* force. More

than that, *Chevron* cannot tenably be applied in this sensitive area of Federal-State authority. It is one thing to assume that the States protect their interests in the Halls of Congress when this National body legislates explicitly, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); it is quite another to maintain this assumption when Congress legislates beneath the radar of reasonable scrutiny, leaving it to the whim of an executive branch agency to seize authority when and where it wishes. Administrative deference in this area would only give *Chevron* a bad name. This rule should not be upheld.

II. The Regulation Exceeds Congress's Commerce Clause Powers.

The initial statutory inquiry not only avoids a serious constitutional question but also a fatal one. While the Court has taken many interpretive turns in ascertaining the amount of intrastate commercial activity that will suffice to permit congressional lawmaking in this area, it has never construed the Commerce Clause to include a general police power over local crimes, local torts, local family law or local zoning and land-use matters. The Court should not do so here.

The Court has construed the Commerce Clause to permit regulation of three types of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557-59 (1995). It appears to be common ground that the bird rule is not covered by the first two safe harbors. As to the last inquiry, the Court has considered at least five factors in assessing whether regulated conduct substantially affects interstate commerce. Not one of them, however, is satisfied in this instance.

First, whether in upholding federal legislation or in invalidating it, the Court has long stood by the rudimentary

principle that Congress's commerce powers are not unlimited. As a matter of first principles, the Constitution creates a Federal Government of enumerated powers, all of which—the commerce clause included—are "subject to outer limits." *Lopez*, 514 U.S. at 557. An unwavering line of precedents confirms the Court's steadfast adherence to this modest but foundational principle:

* "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

* The clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

* "The question is necessarily one of degree," and the clause applies to those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37-38.

* "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'" *Katzenbach v.*

McClung, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 195).

* "[T]he power to regulate commerce, though broad indeed, has limits" which "the Court has ample power" to enforce. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *over'd on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *over'd Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

* "No one disputes the proposition that the Constitution created a Federal Government of limited powers." *New York v. United States*, 505 U.S. 144, 155 (1992) (quotation omitted).

* "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

* "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist Papers* No. 45 (J. Madison)).

* The Constitution preserves the basic "distinction between what is truly national and what is truly local." *United States v. Morrison*, 120 S. Ct. at 1754.

Accordingly, the Federal Government may not justify an exercise of its commerce powers on a "rationale[ ]" that "would . . . authorize a general federal police power." *Lopez*, 514 U.S. at 564. As with other constitutional claims, a law cannot be justified by a governmental "interest" "[t]hat is precisely what" the constitutional provision at issue "forbids." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992). *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) (asserted

"governmental interest [must be] unrelated to the suppression of free expression").

The migratory bird rule plainly does not comport with this first prerequisite for sustaining an exercise of Congress's commerce powers. The rule has no limiting principle, and as the facts of this case suggest it permits the Corps to regulate classically local matters, even residential property, virtually whenever it pleases. Any distinction between matters that are truly national and those that are truly local evaporates under this novel assertion of authority. *See Morrison, supra.*

Second, consistent with the economic-sounding terms of the Commerce Clause, the Court has only sustained federal regulation of intrastate activities in the setting of commercial activities. As *Morrison* confirmed just last Term: "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751.

This, too, is an unyielding shortcoming of the migratory bird rule. Regulating any collection of water that is or may become a habitat for migratory birds—for the purpose of allowing bird watchers and hunters to pursue their hobbies no less—simply does not amount to commerce in any traditional sense of the word. The Court has never crossed this line before. No reasoned explanation has been offered for doing so here.

Third, the Court has asked whether the regulated activity concerns an area in which the States have traditionally exercised plenary authority under their general police powers. Land use and zoning laws, it is clear, properly have long been a local, not a national, lawmaking prerogative.

Much as the laws at issue in *Morrison* and *Lopez* covered areas traditionally regulated at the local level—schools, crime and family law—so too the Corps seeks to assert jurisdiction over an area that is uniquely a matter of local oversight. The "regulation of land use," the Court has repeated, "is perhaps

the quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 767 (1982), is "traditionally a function performed by local governments," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979), and is "peculiarly within the province of state and local legislative authorities," *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). *See also Berman v. Parker*, 348 U.S. 26 (1954); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This factor also favors striking the rule.

Fourth, the Court has inquired whether the law contains a jurisdictional element, which cabins its reach to conduct that has "an explicit connection with or effect on interstate commerce." *Morrison*, 120 S. Ct. at 1750-51; *Lopez*, 514 U.S. at 562. Neither the Clean Water Act nor the migratory bird rule has any such limitation.

Fifth, while the Court has not ceded to Congress the ultimate authority to determine the reach of its commerce powers, the Court always asks whether congressional findings support the government's claim that the regulated conduct has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 562. No such findings, however, appear here. As in *Lopez*, the legislative record clangs with silence regarding the constitutional justification for passing this all-encompassing law. Nowhere in the text of the Clean Water Act or the legislative record is there the slightest indication that Congress contemplated the possibility of regulating any and all bodies of water, no matter how remote or attenuated the connection to navigable waters, that are or may become migratory-bird habitats.

Every factor the Court has considered before in gauging the validity of an exercise of commerce power counsels against upholding the migratory bird rule. It has no limiting principle. It is based on an ostensible interstate connection that is non-commercial and non-economic. It concerns an eminently local activity—land use and zoning. It does not contain a confining

jurisdictional element. And it contains not a single congressional factfinding that would reasonably support this assertion of authority. In these respects, the rule is more far-reaching than the laws invalidated in *Lopez* and *Morrison*. It deserves a similar fate.

* * *

Nor, we respectfully submit, would a decision to invalidate the migratory bird rule dishonor the inter-branch imperative that the Court accord a respectful presumption of constitutionality to the actions of the political branches—here to the views of Congress and the Army Corps of Engineers. That presumption of constitutionality, it bears emphasis, runs in two directions on occasions like this one. In controversies over the constitutional lines of authority between one politically-accountable branch and another, the Court customarily engages in zero-sum decisionmaking. One side's loss invariably becomes the other's gain. Take, for example, a horizontal separation-of-powers dispute between Congress and the President. Both deserve deference in obeying their oaths to follow the Constitution, and neither has a greater claim to the benefit of constitutional doubt than the other. The same is true of vertical separation-of-powers disputes. When the national government and local governments square off over the reach of their respective powers, Congress's aggrandizement of power customarily leads to a diminution of local power. And the opposite, of course, is true. One simply cannot give Congress the presumption of interpreting the Constitution correctly without slighting the States' capacity to do the same. It is, in short, no more aggressive to deny Congress's assertion of authority than it is an act of judicial restraint to respect a State's traditional constitutional prerogative in that same area.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

	ALABAMA	ALASKA
WETLANDS STATUTES	Code of Alabama: § 9-7-10 (1977) (Definitions) § 9-9-5 (1977) (Establishment of district) § 41-10-235 (1991) (Commemorative markers and plaques) Constitutional Amendments: Ala. Const. Amend. No. 543 (1993)	ALASKA STAT.: § 41.21.522 (Michie 1998) (Acquisitions) § 16.20.034 (Michie 1998) (Wetlands game refuge) § 41.17.950 (Michie Supp. 1999) (Definitions) § 41.21.518 (Michie 1998) (Establishment of wetlands management area) § 41.21.520 (Michie 1998) (Incompatible uses)

	ALABAMA	ALASKA
MIGRATORY BIRD STATUTES	Code of Alabama: § 9-11-244 (1997) (Taking of protected birds) § 9-11-430 (1997) (Preservation of wetlands and migratory waterfowl – definitions) § 9-11-431 (1997) (Construction of article) § 9-11-432 (Supp. 1999) (Stamp requirement for hunting migratory fowl) § 9-11-433 (Supp. 1999) (Issuance of stamp) § 9-11-434 (1997) (Revenue used in preservation of wetlands for migratory fowl) § 9-11-435 (1997) (Requirements for approving projects outside U.S.)	ALASKA STAT.: § 16.20.039 (Michie 1998) (Migratory waterfowl refuge)

	ARIZONA	
WETLAND STATUTES	ARIZ. REV. STAT. ANN.: § 49-243 (West Supp. 2000) (Aquifier protection permits) § 49-772 (West 1997) (Location restrictions for solid waste landfills)	
MIGRATORY BIRD STATUTES	ARIZ. REV. STAT. ANN.: § 17-235 (West 1996) (Game & Fish Department – Powers & Duties concerning migratory birds) § 17-270 (West 1996) (Waterfowl conservation fund) § 17-333 (West Supp. 2000) (Taking & handling of wildlife – license, classes & fees)	

	ARIZONA	
	§ 17-731 (West Supp. 2000) (Migratory birds may only be possessed transported in with the Migratory Bird Treaty Act)	

	ARKANSAS	CALIFORNIA
WETLAND STATUTES	ARK. CODE ANN.: § 15-20-207 (Michie 1987) (Soil & Water Conservation Commission powers and duties) § 15-20-310 (Michie 1987) (Environmental Quality Act – acquisition of natural areas) § 15-20-705 (Michie 1987) (Scenic Resources Act – duties of agencies) § 15-20-802 (Michie 1987) (Soil & Water Conservation Commission Pooled Loan Securitization Act) § 15-21-501 (Michie 1987) (State Land Information Board – purpose)	CAL FISH & G. CODE: § 1386 (West 1998) (Riparian Habitat Conservation program) §§ 1410-1431 (West 1998) (Inland Wetlands Conservation Program Art. 1-3) §§ 1776-1796 (West 1998) (Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993) § 2620 (West 1998)(Habitat Enhancement Program) §§ 2785-2786 (West 1998) (California Wildlife Protection Act of 1990)

	ARKANSAS	CALIFORNIA
	§ 15-22-1001 (Michie 1987) – § 15-22- 1012 (Michie 1987) (Wetlands Mitigation Bank Act) § 15-57-409 (Michie 1987) (Reclamation of land) §§ 26-51-1502 (Michie 1987) - 26-51-1506 (Michie 1987) (Private Wetland & Riparian Zone Creation & Incentive) Acts 1993, No. 150, § § 1-9 (Historical Notes) Acts 1995, No. 1224 (Historical Notes)	CAL GOV. CODE: §65081.3 (West 1997) (Transportation planning and programming) §§ 66602.1 – 66682 (West 1997) (San Franciso Bay Wetlands) § 66907.12 (West 1997)(California Tahoe Conservancy) § 67675 (West 1997) (Fort Ord Reuse Authority) CAL. HARB & NAV. CODE: § 523 (West 2000 Supp.) (Removal of vessel from public waterway) § 1720 (West 2000 Supp.) (Port facility construction)

	ARKANSAS	CALIFORNIA
		CAL. HEALTH & SAFETY CODE: § 25270.5 (West 1999) (Storage of Petroleum – Inspection schedule) § 25270.11(West 1999) (Environmental Trust Fund) § 33492.93 (West 1999) (Mare Island Redevelopment Project Area) § 44470 (West 1996) (Halogenated Refrigerants) CAL. PUB.RES.CODE: § 5096.139 (West 1984) (Nejedly-Heart State, Urban, and Coastal Park Bond Act of 1976)

	ARKANSAS	CALIFORNIA
		§ 5096.197 (West 1984) (California Parklands Act of 1980) § 5096.310 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Creation and use) § 5096.347 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Sierra Nevada-Cascade Mountain Region) § 5096.350 (West Supp. 2000.) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 –Wildlife Program)

	ARKANSAS	CALIFORNIA
		§ 5096.352 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Coastal Protection Program) § 5096.357 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Fish and Game Program) §§ 5810 5818 (West 1984) (Wetlands Protection Act) § 5850 (West Supp. 2000) (San Francisco Bikeway System)

	ARKANSAS	CALIFORNIA
		§§ 5902, 5907, 5929 (West Supp. 2000) (California Wildlife, Coastal, and Park Land Conservation Act – Definitions, Expenditure of funds, Wetlands acquisition) § 6008 (West Supp. 2000) (Restriction on sale of right to use state-owned lands in Humbolt Bay) § 6890 (West Supp. 2000) (Permits and leases on state lands other than tide and submerged lands) § 8601 (West Supp. 2000) (Kapiloff Land Bank Act – Definitions) § 8602 (West Supp. 2000) (Kapiloff Land Bank Act – Legislative findings and declarations)

	ARKANSAS	CALIFORNIA
		§ 8613 (West Supp. 2000) (Kapiloff Land Bank Act – Wetlands acquisition) § 21080.23 (West Supp. 2000) (Environmental Quality – Pipeline project) § 26403 (West 1996) (Energy and Resources Fund – Programs eligible for funding) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 30116 – 30607.1(West 1996) (California Coastal Act)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 31006 (West Supp. 2000) (State Coastal Conservancy – Coastal zone) § 31162 (West 1996) (San Francisco Bay Area Conservancy Programs – Goals) §31354 (West 1996) (State Coastal Conservancy-Establishment) § 32023 (West 1996) (California Urban Waterfront Area Restoration Financing Authority Act – Definitions – Coastal zone) § 35031 (West Supp. 2000) (Coastal County and City Offshore Energy Assistance)

	ARKANSAS	CALIFORNIA
		CAL. WATER CODE: § 1707 (West Supp. 2000) (Change for purposes of preserving or enhancing wetlands) § 10633 (West Supp. 2000) (Urban Water management Plans – Content of plans) § 12565 (West Supp. 2000) (Colorado River Management Program) §12929.26 (West 1992) (Environmental Water Act of 1989 – Purposes eligible for funding) § 13142.5 (West Supp. 2000) (State Policy for Water Quality Control – Coastal Marine Environment)

	ARKANSAS	CALIFORNIA
	—	§ 13576 (West Supp. 2000) (Water Recycling Act of 1991) §§ 14906-14907 (West Supp. 2000) (San Joaquin Valley Drainage Relief Act) §§ 78500.4, 78684 (West Supp. 2000) (Safe, Clean, Reliable Water Supply Act – Objectives and Definitions) §§ 79080 – 79104.104 (West Supp. 2000) (Watershed Protection Program) CAL. WATER CODE APP.: § 43-26-1 (West Supp. 2000) (San Bernardino County Flood Control Act)

	ARKANSAS	CALIFORNIA
		§ 48-12 (West Supp. 2000) (Riverside County Flood Control and Water Conservation District Act) § 49-3.5 – § 49-36.5 (West Supp. 2000) (San Luis Obispo County Flood Control and Water Conservation District Act) § 136-61 (West Supp. 2000) (Antelope Valley Storm Water Conservation and Flood Control District)
MIGRATORY BIRD STATUTES	ARK. CODE ANN.: § 5-73-130 (Michie 1987) (Unlawful for guide of persons hunting migratory birds to carry a gun) § 15-41-105 (Michie 1987) (Programs for migratory waterfowl)	CAL FISH & GAME CODE: § 307 (West 1998)(Bag and possession limits) §§ 355-357 (West 1998) (Regulations pertaining to migratory birds)

	ARKANSAS	CALIFORNIA
	§ 15-42-104 (Michie 1987) (Hunting and fishing license fees) § 22-7-206 (Michie 1987) (Waterfowl and wildlife refuges) Acts 1943, No. 146 § 20 (Game and fish refuges)	§ 375 (West 1998)(Compact between AZ and CA for hunting rights) §2050 (West 1998)(Endangered Species General Provisions) §§ 3700-3706 (West 1998) (Migratory Bird Statute) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 29705 (West 1996) (Delta Protection Act of 1992 – Wildlife habitats)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 29760 (West Supp. 2000) (Delta Protection Act of 1992 – Long term resource management plan)

	ARKANSAS	CALIFORNIA
WETLAND STATUTES	ARK. CODE ANN.: § 15-20-207 (Michie 1987) (Soil & Water Conservation Commission powers and duties) § 15-20-310 (Michie 1987) (Environmental Quality Act – acquisition of natural areas) § 15-20-705 (Michie 1987) (Scenic Resources Act – duties of agencies) § 15-20-802 (Michie 1987) (Soil & Water Conservation Commission Pooled Loan Securitization Act) § 15-21-501 (Michie 1987) (State Land Information Board – purpose)	CAL FISH & G. CODE: § 1386 (West 1998) (Riparian Habitat Conservation program) §§ 1410-1431 (West 1998) (Inland Wetlands Conservation Program Art. 1-3) §§ 1776-1796 (West 1998) (Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993) § 2620 (West 1998)(Habitat Enhancement Program) §§ 2785-2786 (West 1998) (California Wildlife Protection Act of 1990)

	ARKANSAS	CALIFORNIA
	§ 15-22-1001 (Michie 1987) – § 15-22- 1012 (Michie 1987) (Wetlands Mitigation Bank Act) § 15-57-409 (Michie 1987) (Reclamation of land) §§ 26-51-1502 (Michie 1987) - 26-51-1506 (Michie 1987) (Private Wetland & Riparian Zone Creation & Incentive) Acts 1993, No. 150, § § 1-9 (Historical Notes) Acts 1995, No. 1224 (Historical Notes)	CAL GOV. CODE: §65081.3 (West 1997) (Transportation planning and programming) §§ 66602.1 – 66682 (West 1997) (San Franciso Bay Wetlands) § 66907.12 (West 1997)(California Tahoe Conservancy) § 67675 (West 1997) (Fort Ord Reuse Authority) CAL. HARB & NAV. CODE: § 523 (West 2000 Supp.) (Removal of vessel from public waterway) § 1720 (West 2000 Supp.) (Port facility construction)

	ARKANSAS	CALIFORNIA
		CAL. HEALTH & SAFETY CODE: § 25270.5 (West 1999) (Storage of Petroleum – Inspection schedule) § 25270.11(West 1999) (Environmental Trust Fund) § 33492.93 (West 1999) (Mare Island Redevelopment Project Area) § 44470 (West 1996) (Halogenated Refrigerants) CAL. PUB.RES.CODE: § 5096.139 (West 1984) (Nejedly-Hear State, Urban, and Coastal Park Bond Act of 1976)

	ARKANSAS	CALIFORNIA
		§ 5096.197 (West 1984) (California Parklands Act of 1980) § 5096.310 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Creation and use) § 5096.347 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 – Sierra Nevada-Cascade Mountain Region) § 5096.350 (West Supp. 2000.) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000 –Wildlife Program)

	ARKANSAS	CALIFORNIA
		§ 5096.352 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Coastal Protection Program) § 5096.357 (West Supp. 2000) (Safe Neighborhood Parks, Clean Water, Clean Air and Coastal Protection Bond Act of 2000-Fish and Game Program) §§ 5810-5818 (West 1984) (Wetlands Protection Act) § 5850 (West Supp. 2000) (San Francisco Bikeway System)

	ARKANSAS	CALIFORNIA
		§§ 5902, 5907, 5929 (West Supp. 2000) (California Wildlife, Coastal, and Park Land Conservation Act – Definitions, Expenditure of funds, Wetlands acquisition) § 6008 (West Supp. 2000) (Restriction on sale of right to use state-owned lands in Humbolt Bay) § 6890 (West Supp. 2000) (Permits and leases on state lands other than tide and submerged lands) § 8601 (West Supp. 2000) (Kapiloff Land Bank Act – Definitions) § 8602 (West Supp. 2000) (Kapiloff Land Bank Act – Legislative findings and declarations)

	ARKANSAS	CALIFORNIA
		§ 8613 (West Supp. 2000) (Kapiloff Land Bank Act – Wetlands acquisition) § 21080.23 (West Supp. 2000) (Environmental Quality – Pipeline project) § 26403 (West 1996) (Energy and Resources Fund – Programs eligible for funding) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 30116 – 30607.1(West 1996) (California Coastal Act)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 31006 (West Supp. 2000) (State Coastal Conservancy – Coastal zone) § 31162 (West 1996) (San Francisco Bay Area Conservancy Programs – Goals) §31354 (West 1996) (State Coastal Conservancy-Establishment) § 32023 (West 1996) (California Urban Waterfront Area Restoration Financing Authority Act – Definitions – Coastal zone) § 35031 (West Supp. 2000) (Coastal County and City Offshore Energy Assistance)

	ARKANSAS	CALIFORNIA
		CAL. WATER CODE: § 1707 (West Supp. 2000) (Change for purposes of preserving or enhancing wetlands) § 10633 (West Supp. 2000) (Urban Water management Plans – Content of plans) § 12565 (West Supp. 2000) (Colorado River Management Program) §12929.26 (West 1992) (Environmental Water Act of 1989 – Purposes eligible for funding) § 13142.5 (West Supp. 2000) (State Policy for Water Quality Control – Coastal Marine Environment)

	ARKANSAS	CALIFORNIA
		§ 13576 (West Supp. 2000) (Water Recycling Act of 1991) §§ 14906-14907 (West Supp. 2000) (San Joaquin Valley Drainage Relief Act) §§ 78500.4, 78684 (West Supp. 2000) (Safe, Clean, Reliable Water Supply Act – Objectives and Definitions) §§ 79080 – 79104.104 (West Supp. 2000) (Watershed Protection Program) CAL. WATER CODE APP.: § 43-26-1 (West Supp. 2000) (San Bernardino County Flood Control Act)

	ARKANSAS	CALIFORNIA
	—	§ 48-12 (West Supp. 2000) (Riverside County Flood Control and Water Conservation District Act) § 49-3.5 – § 49-36.5 (West Supp. 2000) (San Luis Obispo County Flood Control and Water Conservation District Act) § 136-61 (West Supp. 2000) (Antelope Valley Storm Water Conservation and Flood Control District)
MIGRATORY BIRD STATUTES	ARK. CODE ANN.: § 5-73-130 (Michie 1987) (Unlawful for guide of persons hunting migratory birds to carry a gun) § 15-41-105 (Michie 1987) (Programs for migratory waterfowl)	CAL FISH & GAME CODE: § 307 (West 1998)(Bag and possession limits) §§ 355-357 (West 1998) (Regulations pertaining to migratory birds)

	ARKANSAS	CALIFORNIA
	§ 15-42-104 (Michie 1987) (Hunting and fishing license fees) § 22-7-206 (Michie 1987) (Waterfowl and wildlife refuges) Acts 1943, No. 146 § 20 (Game and fish refuges)	§ 375 (West 1998)(Compact between AZ and CA for hunting rights) §2050 (West 1998)(Endangered Species General Provisions) §§ 3700-3706 (West 1998) (Migratory Bird Statute) §§ 29002 – 29501 (West 1996) (Suisun Marsh Preservation Chapters 1,2, and 5)* § 29705 (West 1996) (Delta Protection Act of 1992 – Wildlife habitats)

* This statute contains information on both "Wetlands and Migratory Waterfowl"

	ARKANSAS	CALIFORNIA
		§ 29760 (West Supp. 2000) (Delta Protection Act of 1992 – Long term resource management plan)

	COLORADO	CONNECTICUT
WETLANDS STATUTES		CONN. GEN. STAT. ANN.: § 7-131a (1999) (Conservation commissions) § 8-3c (Supp. 2000) (Zoning, housing, economic development – special permits) § 8-26 (Supp. 2000) (Zoning, housing, economic development – approval of subdivision involving wetlands) § 22a-27k (1995) (Long Island Sound account) §§ 22a-28 (1995) - 22a-45c (Supp. 2000) (Wetlands and watercourses)

	COLORADO	CONNECTICUT
		§§ 22a-91 (1995) - 22a-113a (1995) (Environmental protection – coastal management) § 22a-113o (1995) (Environmental protection – harbor management) §§ 22a-349a (1995) - 22a-361 (1995) (Environmental protection – water resources – general permits) § 22a-363b (Supp. 2000) (Activities eligible for certificate of permission) § 22a-378a (1995) (Environmental protection – general permits for minor activities)

	COLORADO	CONNECTICUT
		§§ 22a-403 (Supp. 2000) - 22a – 411(1995)(Environmental protection – Dams and reservoirs – permits) § 22a – 477 (Supp. 2000) (Clean Water Fund) § 23-65k (1990) (Municipal regulation of forest practices) § 25-68d (1990) (Certification of activity affecting the floodplain) § 25-102ww (1990) (Applications affecting Shepaug and Bantam River) § 25-102xx (1990) (Model river protection ordinance) §§ 25-204 (1990) - 25-206 (1990) (River corridor protection plan)

	COLORADO	CONNECTICUT
		§§ 25-234 (1990) - 25-236 (1990) (Multiple use rivers – management plan) § 26-17a (1990) (Acquisition and preservation of tidal wetlands)
MIGRATORY BIRD STATUTES	COLO. REV. STAT.: § 33-1-115 (West 1998) (Migratory birds)	CONN. GEN. STAT. ANN.: § 26-27c (1990) (Reproduction of migratory bird stamp) § 26-48a (1990) (Management of migratory game birds) § 26-91 (1990) (Taking of migratory game birds)

	DELAWARE	DISTRICT OF COLUMBIA
WETLANDS STATUTES	DEL. CODE ANN. tit.: 7 § 4001 (1991) (Erosion and Sedimentation Control – legislative findings) 7 § 6036 (1991) (Environmental control – projects of state significance) 7 § 6601 (1991) - tit. 7 § 6620 (1991) (Wetlands Act) 7 § 7004 (Supp. 1998) (Coastal Zone Act – uses allowed by permit) 9 § 2656 (Supp. 1998) (Quality of Life Act – elements of plan) 9 § 4956 (Supp. 1998) (Quality of Life Act – elements of plan)	

	DELAWARE	DISTRICT OF COLUMBIA
	9 § 6956 (Supp. 1998) (Quality of Life Act – elements of plan)	
MIGRATORY BIRD STATUTES	DEL. CODE ANN. tit.: 7 § 707 (Supp. 1998) (Hunting or shooting from a motor vehicle) 7 § 717 (Supp. 1998) (Frightening or harassing migratory birds)	D.C. CODE ANN.: § 22 – 1628 (1996) (Game and fish Laws)

	FLORIDA	GEORGIA
WETLANDS STATUTES	FLA. STAT. ANN.: §163.3177 (West 2000) (Land development) § 163.3178 (West 2000) (Land development – coastal management) §187.201 (West 2000) (Planning & development – state comprehensive plan including preservation of wetlands) §253.36 (West 1999) (Title to reclaimed wetlands) §258.501 (West 1999) (Myakka river Wild & Scenic Designation Preservation Act) §338.250 (West Supp. 2000) (Central Florida Beltway mitigation)	GA. CODE ANN.: §12-2-8 (1996) (Protection of natural resources) §12-5-30 (1996) (Control of water pollution & surface-water use) §12-5-472 (1996) (Water supply)

	FLORIDA	GEORGIA
	§369.255 (West 2000) (Aquatic plant control) §369.305 (West 2000) (Wekiva River Protection) §369.307 (West 2000) (Wekiva River Protection) §373.4145 (West 2000) (Management and storage of surface waters) §373.421 (West 2000) (Management and storage of surface waters) §373.4211 (West 2000) (Management and storage of surface waters) §375.031 (West 2000) (Land acquisition and conservation)	

	FLORIDA	GEORGIA
	§376.121 (West 2000) (Pollutant Discharge Prevention & Removal) §380.0552 (West 2000) (Environmental land and water management) §380.061 (West 2000) (Florida Quality Developments Program) §403.061 (West 1998) (Pollution Control) §403.927 (West 1998) (Use of water in farming and forestry activities) §403.9328 (West 1998) (Alteration & trimming of mangroves) §403.9332 (West 1998) (Mitigation and enforcement)	

	FLORIDA	GEORGIA
MIGRATORY BIRD STATUTES	FLA. STAT. ANN.: §372.5712 (West 2000) (Waterfowl permit revenues) §372.5714 (West 2000) (Creation of waterfowl advisory Council)	GA. CODE ANN.: §27-1-6 (1997) (Game and Fish – powers and duties of department) §27-2-20 (Supp. 1999) (Federal Migratory Bird conservation stamp)

	HAWAII	IDAHO
WETLANDS STATUTES	HAW. REV. STAT. ANN.: § 174C-3 (Michie 1993) (Water and land development – definitions) §342E-1 (Michie 1993) (Nonpoint source pollution management & control – definitions)	IDAHO CODE: §39-7407 (1998) (Idaho Solid Waste Facilities Act – site certification)
MIGRATORY BIRD STATUTES		IDAHO CODE: §36-105 (Supp. 1999) (Fish & Game Commission orders) §36-201 (1994) (Classification of wildlife)

	ILLINOIS	INDIANA
WETLANDS STATUTES	20 ILL. COMP. STAT. ANN. 830/1-2 (West 1993) - 830/3-6 (West 1993) (Interagency Wetland Policy Act) 30 ILL. COMP. STAT. ANN. 150/3 (West 1993) (Natural Heritage Fund Act – purpose) 70 ILL. COMP. STAT. ANN.1832/20 (West Supp. 2000) (Mid-America Intermodal Authority Port District Act) 210 ILL. COMP. STAT. ANN. 95/2 (West 1993) (Campground Licensing & Recreational Act) 505 ILL. COMP. STAT. ANN. 35/1-3 (West 1993) (Illinois Conservation Enhancement Act)	IND. CODE ANN.: §14-12-2-1 (West 1998) (Indiana Heritage Trust Program – purpose) §14-12-2-4 (West 1998) (Indiana Heritage Trust Program – "project" defined) §14-26-2-16 (West 1998) (Lake preservation – applicability to water supply reservoirs) §14-30-2-22 (West 1998) (Maumee River Basin Commission – powers pertaining to property)

	ILLINOIS	INDIANA
	520 ILL. COMP. STAT. ANN. 25/10 (West Supp. 2000) (Habitat Endowment Act) 525 ILL. COMP. STAT. ANN. 33/5 (West Supp. 2000) (Illinois Open Land Trust Act) 525 ILL. COMP. STAT. ANN. 33/10 (West Supp. 2000) (Illinois Open Land Act – definitions) 525 ILL. COMP. STAT. ANN. 35/14 (Natural Areas Acquisition Fund)	
MIGRATORY BIRD STATUTES	5 ILL. COMP. STAT. ANN. 580/ 1 (West 1993) (Consent for acquisition of land) 30 ILL. COMP. STAT. ANN. 105/5.151. (West 1993) (State Migratory Waterfowl Stamp Fund)	IND. CODE ANN.: §14-8-2-162 (West 1998) (Natural & cultural resources – definitions) §14-22-6-2 (West 1998) (Regulation of migratory birds)

	ILLINOIS	INDIANA
	515 ILL. COMP. STAT. ANN. 5/1-230 (West 1993) (Wildlife & Fish Fund) 520 ILL. COMP. STAT. ANN. 5/1.3 (West 1993) (Authority to regulate the taking of wildlife) 520 ILL. COMP. STAT. ANN. 5/1.28 (West 1993) (Migratory Waterfowl Stamp Fund) 520 ILL. COMP. STAT. ANN. 5/1.29 (West 1993) (Migratory Waterfowl Stamp Fund) 520 ILL. COMP. STAT. ANN. 5/2.4 (West 1993) (Birds of prey) 520 ILL. COMP. STAT. ANN. 5/2.18-1 (West 1993) (Migratory Game Birds)	§14-22-6-3 (West 1998) (Migratory birds – permit or license required) §14-22-7-1 (West 1998) (Migratory waterfowl defined) §§ 14-22-7-2 (West 1998) - 14-22-7-5 (West 1998) (Migratory waterfowl stamp) §14-22-33-1 (West 1998) (Migratory birds – effect of federal laws)

	ILLINOIS	INDIANA
	520 ILL. COMP. STAT. ANN. 5/2.19 (West 1993) (Migratory waterfowl – protective regulations) 520 ILL. COMP. STAT. ANN. 5/2.33 (West 1993) (Game protective regulations) 520 ILL. COMP. STAT. ANN. 5/3.1 - 5/3.2 (West Supp. 2000) (Licenses and Permits required for the taking of migratory waterfowl) 520 ILL. COMP. STAT. ANN. 5/3.6 (West 1993) - 5/3.8 (West Supp. 2000) (Migratory waterfowl hunting area permits)	

	IOWA	KANSAS
WETLANDS STATUTES	IOWA CODE ANN.: §§ 314.23 - 314.24 (West 1997) (Environmental protection of wetlands during highway construction or maintenance) §352.1 (West 1994) (County Land Preservation & Use Commissions – purpose) §352.4 (West 1994) (County Land Preservation & Use Commissions – county inventories) §352.5 (West 1994) (County Land preservation and use plan)	KAN. STAT. ANN.: §32-807 (1993) (Dept. of Wildlife & Parks – organization & powers) §32-839 (1998) (Steve Lloyd Wetlands designation) §32-846 (1998) (Approval of agreement & lease for Milford lake wetlands)

	IOWA	KANSAS
	§455A.15 (West 1997) (Dept. of Natural Resources Resource Enhancement & Protection – legislative findings) §455B.448 (West 1997) (Solid waste disposal) §456B.1 (West 1997) (Definitions – wetlands) §456B.11 (West 1997) (Agriculture drainage wells –wetlands— conservation easements) §456B.12 (West 1997) (Inventory of protected wetlands) §456B.13 (West Supp. 2000) (Protection of wetlands) §456B.14 (West 1997) (Civil penalty for violating wetland protection statutes)	

	IOWA	KANSAS
MIGRATORY BIRD STATUTES	IOWA CODE ANN.: §481A.48 (West 1999) (Restrictions on hunting or killing game birds and animals) §481B.1 (West 1999) (Endangered plants & wildlife – definitions) §484A.1 (West 1999) (Migratory game bird – definition) §484A.2 (West 1999) (Migratory game bird fee) §484A.4 (West 1999) (Use of revenue from migratory game bird fees) §484A.5 (West 1999) (Migratory waterfowl project approval requirement)	KAN. STAT. ANN.: §32-939 (1993) (Migratory waterfowl habitat stamp) §32-989 (1993) (Service charge for migratory waterfowl habitat stamp) §32-993 (1993) (Migratory waterfowl propagation & protection fund) §32-1008 (1993) (Migratory birds – defined)

	IOWA	KANSAS
	§484A.6 (West 1999) (Penalty for violating migratory waterfowl provisions) §484B.4 (West Supp. 2000) (Hunting preserves)	

	KENTUCKY	LOUISIANA
WETLANDS STATUTES	KY. REV. STAT. ANN.: § 146.550 (Banks-Baldwin 1996) (Wetlands – definition) § 146.555 (Banks-Baldwin 1996) (Natural Resources & Environmental Protection Cabinet Heritage Land Conservation – legislative finding) § 146.565 (Banks-Baldwin 1996) (Acquisition of natural areas & wetlands) § 224.60-137 (Banks-Baldwin Supp. 1998) (Underground storage facilities)	LA. CONST. Art. 7, § 10.2 (Supp. 2000) (Wetlands Conservation & Restoration Fund) LA. REV. STAT. ANN.: § 30.25 (West Supp. 2000) (Closure of production pits in the wetlands) § 30:907 (West Supp. 2000) (Surface Mining & Reclamation Act) § 30:2073 (West 2000) (Louisiana Water Control Law – Definitions) § 30:2074 (West 2000) (Secretary of environmental quality – powers & duties)

	KENTUCKY	LOUISIANA
		§ 34:3103 (West Supp. 2000) (Offshore Terminal Authority – jurisdiction) § 34:3473 (West Supp. 2000) (Millennium Port Authority – jurisdiction) § 38:18 (West 1989) (Dept. of Public Works – conference with wildlife & fisheries commission) §§ 49:213.1 (West Supp. 2000) - 49:213.22 (West Supp. 2000) (Wetlands Conservation & Restoration Authority – creation, management, funding, etc.)

	KENTUCKY	LOUISIANA
		§§ 49:214.1 (West Supp. 2000) - 49:214.6 (West Supp. 2000) (Louisiana Coastal Wetlands Conservation & Restoration Program) §§ 49:214.21 (West Supp. 2000) - 49:214.42 (West Supp. 2000) (Louisiana Coastal Management Program) § 56:266 (West Supp. 2000) (Louisiana Fur & Alligator Public Education & Marketing Fund) §§ 56:281 (West Supp. 2000 - 56:284 (West Supp. 2000) (Nutria control cost-sharing) § 56:579.1 (West Supp. 2000) (Permitting of mariculture in the coastal zone)

	KENTUCKY	LOUISIANA
MIGRATORY BIRD STATUTES	KY. REV. STAT. ANN.: § 146.560 (Banks-Baldwin 1996) (Kentucky Heritage Land Conservation Fund Board) § 150.330 (Banks-Baldwin 1996) (Migratory birds; waterfowl) § 150.340 (Banks-Baldwin 1996) (Limit on possession – migratory birds) § 150.600 (Banks-Baldwin 1996) (Taking of waterfowl – permits & fees) § 150.603 (Banks-Baldwin 1996) (Waterfowl or migratory game bird permit required)	LA. REV. STAT. ANN.: § 47:305.43 (West Supp. 2000) (Exemptions on taxes for nonprofit organizations dedicated to the conservation of migratory waterfowl) § 56:8 (West Supp. 2000) (Wildlife & Fisheries Commission – Definitions) § 56:10 (West Supp. 2000) (Wildlife & Fisheries Commission – annual report to governor) § 6:118 (West Supp. 2000) (Migratory game bird violations) §§ 56:150 (West Supp. 2000) - 56:156 (West Supp. 2000) (Louisiana Duck Stamp Program)

	MAINE	MARYLAND
WETLANDS STATUTES	ME. REV. STAT. ANN. tit.: 12 § 685-B (West Supp. 1999) (Maine Land Use Regulation Commission) 12 § 4751 - 12 § 4758 (West 1994) (Wetlands – zoning) 12 § 6022 (Marine Resources – Dept. Administration – commissioner's appointment, duties & powers) 12 § 8876-A (West Supp. 1999) (Forest Resource Assessment Program) 30-A § 4312 (West 1996) (Growth Management Program) 38 § 419-B (West Supp. 1999) (Pollution control)	MD. CODE ANN., [Environment]: §§ 5-901 (1996) - 5-908 (1996) (Nontidal Wetlands) §§ 5-909 (Supp. 1999) - 5-910 (Supp. 1999) (Nontidal Wetlands) § 5-911 (1996) (Nontidal wetlands) §§ 16-101 - 16- 503 (1996) (Wetlands & Riparian Rights) §§ 16-104, 16-202, 16-205, 16-307 (Supp. 1999) (Wetlands & Riparian Rights) MD. CODE ANN., [Natural Resources]: § 3-306 (Supp. 1999) (Power Plant Research Program)

	MAINE	MARYLAND
	38 § 435 (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 436-A (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 439-A (West Supp. 1999) (Mandatory Shoreland Zoning) 38 § 480-A (West 1989) - 38 § 480-Z (West Supp. 1999) (Environmental Protection Board – Protection of Natural Resources) 38 § 636 (West Supp. 1999) (Permits for hydropower projects) 38 § 840 (West Supp. 1999) (Dam registration & abandonment) 38 § 951 (West Supp. 1999) - 38 § 963 (West 1989) (Saco River Corridor)	§ 5-1217 (1997) (Acceptance of gifts of land or wetlands) §§ 5-1502 (1997) - 5-1504 (1997) (Heritage Conservation Fund) § 8-404 (1990) (Scenic & Wild Rivers Review Board & Related Program) §§ 8-1201 (1990) - 8-1210 (1990) (Nontidal Wetlands – legislative findings, goal of statewide program established, etc.) §§ 8-1807 (Supp. 1999) - 8-1808.7 (Supp. 1999) (Chesapeake bay Critical Area Protection Program)

	MAINE	MARYLAND
	38 § 1901 (West 1989) (Coastal Barrier Resources System – findings & declaration of policy) 38 § 2001 (West Supp. 1999) (Coastal & lake watershed districts – districts authorized) 38 § 2007 (West Supp. 1999) (Coastal & lake watershed districts – powers)	
MIGRATORY BIRD STATUTES	ME. REV. STAT. ANN. tit.: 12 § 753 (West 1994) (State consent to the U.S. to acquire national forests) 12 § 7001 (West Supp. 1999) (Inland Fisheries & Wildlife – definitions) 12 § 7109 (West Supp. 1999) (Migratory waterfowl permit)	MD. CODE ANN., [Natural Resources]: § 10-308.1 (Supp. 1999) (Migratory waterfowl stamp) § 10-402 (Supp. 1999) (Hunting & taking nests & eggs of wild and migratory birds)

	MAINE	MARYLAND
	12 § 7407 (West 1994) (Migratory waterfowl hunting)	§ 10-407 (Supp. 1999) (Open season for wetland game birds, wild waterfowl, and other migratory birds regulated by federal rule)

	MASSACHUSETTS	
WETLANDS STATUTES	MASS. GEN. LAWS ANN.: ch. 12, § 11D (West 1996) (Creation of division of enviro mental protection in the dept. of the attorney general) ch. 21A, § 2 (West 1994) (Executive Office of Environmental Affairs – duties & functions) ch. 21C, § 7 (West Supp. 2000) (Massachusetts Hazardous Waste Management Act) ch. 30, § 61 (West Supp. 2000) (Environmental impact of projects conducted by agencies) ch. 40, § 8C (West 1999) (Powers of cities to create conservation commissions)	

	MASSACHUSETTS	
	ch. 78A, § 3 (West 1996) (Youth Conservation & Service Corps – activities include wetlands protection) ch. 92, § 107A (West Supp. 2000) (Degradation of watershed) ch. 111, § 150A ½ (West Supp. 2000) (Standards & criteria for siting of facilities) ch. 130, § 105 (West Supp. 2000) (Protection of coastal wetlands) ch. 131, § 40 (West Supp. 2000) (Removal, fill, dredging or altering of land bordering waters) ch. 131, § 40A (West 1991) (Protection of inland wetlands)	

	MASSACHUSETTS	
	ch. 164, § 69J ¼ (West Supp. 2000) (Petitions to construct generating facilities – wetlands impact) ch. 214 § 7A (Damage to environment – remedy & procedure)	
MIGRATORY BIRD STATUTES		

	MICHIGAN	MINNESOTA
WETLAND STATUTES	MICH. COMP. LAWS. ANN: §§ 324.30104 – 324.30323 (West 1999) (Habitat Protection, Inland Waters – Wetland Protection) § 324.60904 (West 1999) (Land resource inventory; format; contents; wetland protection)	2000 Minn. Sess. Law Serv. Ch. 382 (West) (Natural Resources – Wetland Regulation) 1995 Minn Laws § 84.0895 (Supp. 2000)(Department of Natural Resources – Protection of threatened and endangered species) 1997 Minn Laws § 97A.145 (Wetlands for wildlife) 1997 Minn Laws § 103F.601 (Waterbank Program) 1997 Minn Laws § 103A.202 (Wetland Policy) 1997 Minn. Laws § 103B.3355 (Wetland functions for determining public values)

	MICHIGAN	MINNESOTA
		1997 Minn Laws §§ 103F.511, 103F. 516, 103F.535 (Reinvest in Minnesota Resources Act – Wetland Provisions) 1997 Minn. Laws §§103F.612 – 103F.616 (Wetland Preservation Areas.) 1997 Minn Laws §§ 103F.901-103F. 905 (Wetland Establishment and Restoration Program) 1997 Minn Laws §§ 103G.221 – 103G.237 (Waters of the State – Wetlands) 1999 Minn Laws § 275.295 (Taxes – Wetlands exemption) 1999 Minn Laws § 282.018 (Forfeited Land Sales Prohibited or Limited Sales – Wetlands)

	MICHIGAN	MINNESOTA
MIGRATORY BIRD STATUTES	MICH. COMP. LAWS. ANN: § 324.36501 (West 1999) (Endangered Species Protection – Definitions) § 324.43525 (West 1999) (Waterfowl hunting license)	

	MISSISSIPPI	MISSOURI
WETLANDS STATUTES	2000 MISS. LAWS. Ch. 516 (Coastal Wetland Protection Act) MISS CODE ANN: §§ 49-27-13 – 49-27-67 (1999) (Coastal Wetland Protection Act) § 17-17-151 (1999) (Hazardous Waste Management Facility – Application for permit) § 17-17-229 (1999) (Nonhazardous Solid Waste Planning Act of 1991) § 29-15-1 (1999) (Public Trust Tidelands) § 29-15-5 (1999) (Littoral and riparian rights) § 49-15-9 (1999) (Seafood – Riparian Rights)	MO. ANN. STAT. § 21.475 (1969) (Wetland committee created) § 644.037 (2000) (Nationwide permit – certification without conditions of application to impacts on wetlands)

	MISSISSIPPI	MISSOURI
	§ 49-15-301 (1999) (Mississippi Commission on Marine Resources) § 57-15-5 (1999) (Marine Resources – General Policies and Functions)	
MIGRATORY BIRDS STATUTES	MISS CODE ANN.: § 49-7-1 (1999) (Hunting and Fishing – Definitions)	MO. ANN. STAT.: § 252.244 (Supp. 2000) (Wild game – preparation and service)

	MONTANA	NEBRASKA
WETLANDS STATUTES	MONT. CODE ANN.: § 2-15-3405 (1999) (Appointment of wetlands advisory council)	NEB. REV. STAT.: § 39-1320 (1998) (State highways) 2000 Neb. Laws 957
MIGRATORY BIRD STATUTES	MONT. CODE ANN.: § 87-1-305 (1999) (Fish & game refuges)	NEB. REV. STAT.: § 37-229 (Supp. 1999) (Game birds – defined) § 37-233.01 (Supp. 1999) (Migratory waterfowl defined) § 37-902 (1998) (Migratory bird reservations)

	NEVADA	
WETLANDS STATUTES	NEV. REV. STAT.: § 244.388 (Supp. 1999) (Establishment, use & operation of wetlands mitigation bank)	
MIGRATORY BIRD STATUTES	NEV. REV. STAT.: § 503.584 (1995) (Conservation, protection, & propagation of selected species – legislative findings) § 328.195 (Supp. 1999) (Conditions for state consent to federal acquisition of land for wildlife refuge) § 503.620 (1995) (Protection of birds included in Migratory Bird Treaty Act)	

	NEW HAMPSHIRE	NEW JERSEY
WETLANDS STATUTES	N.H. REV. STAT. ANN.: § 21-0:5-a (Supp. 1999)(Wetlands Council) § 21-0:14 (Supp. 1999) (Environmental services – Administrative Appeals) § 79-A:2 (1991) (Taxation – definitions) § 310-A:76 (1995) (Certified wetland scientist) §§ 482-A:1 (Supp. 1999) – 482-A: 27 (Supp. 1999)(Fill and Dredge in Wetlands Act) § 483:10 (1992)(Rivers Corridor Management Plans)	1987 N.J. LAWS 2A:35A-3 (Environmental Rights) 1998 N.J. LAWS 4:27-12 (Aquaculture development – freshwater wetlands) 1998 N.J. LAWS 4:27-13 (Aquaculture development – coastal wetlands) 1991 N.J. LAWS 13:1D-29 (Construction permits - definitions) 2000 supp. N.J. LAWS 13:1D-101 (Permit application checklist; permit defined)

	NEW HAMPSHIRE	NEW JERSEY
	§ 483-A:7 (1992)(Lakes Management and Protection Plans) § 483-B:2 (1992)(Comprehensive Shoreland Protection Act) § 485-A:29 (Supp. 1999)(Water Pollution and Waste Disposal – sewage disposal system)	2000 supp. N.J. LAWS 13:1D-120 (Permit application review – Legislative findings and declarations) 2000 supp. N.J. LAWS 13:1D-121 (Permit application review – definitions) 2000 supp. N.J. LAWS 13:1D-126 (Department of Environmental protection – Enforcement of certain violations – definitions) 2000 supp. N.J. LAWS 13:1D-129 (Department of Environmental protection – Enforcement of certain violations – Rules and Regulations)

	NEW HAMPSHIRE	NEW JERSEY
		1991 N.J.LAWS 13:1E-57 (Solid waste management) 2000 supp. N.J.LAWS 13:8C-24 (Garden State Preservation Trust) 1991 N.J.LAWS 13:19-19 (Coastal Protection – Application of Wetlands Act) 2000 supp. N.J. LAWS 13:9C-1 – 13-9C:4 (Wetlands Mitigation Council) 1991 N.J. LAWS 13:9A-1 – 13:9A-10 (Coastal Wetlands Protection Act) 1991 N.J.LAWS 13:9B-1 – 13:9B-30 (Freshwater Wetlands Protection Act)

	NEW HAMPSHIRE	NEW JERSEY
		2000 supp. N.J.LAWS 40:55D-132 (Extension of permits – Definitions) 2000 supp. N.J LAWS 40:55D-134 (Extension of permits – extension of project exemptions – freshwater wetlands) 1992 N.J.LAWS 58:16A-60 (Flood hazard areas, inapplicability to lands regulated by Wetlands Act of 1970)
MIGRATORY BIRD STATUTES	N.H. REV. STAT. ANN.: § 207:1 (1989) (Fish and Game Commission – Definitions) § 209:6 (1989)(Federal Duck Stamp Required) § 209:6-b (1989)(Rules Relative to Migratory Birds)	1998 N.J.LAWS 4:27-11(Prevention of predation at aquaculture sites by endangered and nongame species) 2000 supp. N.J.LAWS 23:3-1g (Fee for hunting migratory birds)

	NEW HAMPSHIRE	NEW JERSEY
	§ 209:8-a(1989)(Game Birds –Exceptions) § 214:1-d (Supp. 1999)(Licenses) § 214:9 (Supp. 1999)(Licenses – fees)	1997 N.J.LAWS 23:3-75 – 23:3-81 (New Jersey Waterfowl Stamp Act) 1997 N.J.LAWS 23:4-1 (Open and close seasons) 1997 N.J.LAWS 23:4-3 (Bag limit for migratory birds) 1997 N.J.LAWS 23:4-18 (Hunting migratory waterfowl)

	NEW MEXICO	NEW YORK
WETLANDS STATUTES	1978 N.M. LAWS § 75-8-2 (Wetlands Area Restoration)	NY ENVIR. CONSERV.: § 3-0301 (McKinney 1997) (Department of Environmental Conservation) §§ 24-0101 – 24-1305 (McKinney 1997)(Freshwater Wetlands Act) §§ 25-0101 – 25-0601 (McKinney 1997) (Tidal Wetlands Act) § 47-0107 (McKinney 1997) (County and regional environmental management councils) § 49-0205 (McKinney 1997) (State Land Acquisition)

	NEW MEXICO	NEW YORK
		§ 51-0701 (McKinney 1997) (Land Preservation and improvement project – allocation of moneys) § 51-0705 (McKinney 1997) (Land Preservation and improvement project – approval and execution of state projects) § 51-0709 (McKinney 1997) (Land Preservation and improvement project – Approval of municipal wetlands restoration projects) § 51-0711 (McKinney 1997) (Land Preservation and improvement project – Contracts for municipal wetlands restoration projects)

	NEW MEXICO	NEW YORK
		§ 51-0713 (McKinney 1997) (Land Preservation and improvement project – Restriction of alienation of wetlands) § 52-0101 (McKinney 1997) (Environmental Quality Bond Act – Definitions) § 56-0101 (McKinney Supp. 2000) (Clean water/Clean air Bond Act of 1996) § 70-0107 (McKinney 1997) (Environmental Conservation Law – Uniform Procedures) § 70-0117 (McKinney 1997) (Environmental Conservation – special provisions) § 70-2303 (McKinney 1997) (Environmental Conservation Law – Violation – penalties)

	NEW MEXICO	NEW YORK
		§ 70-2307 (McKinney 1997) (Environmental Conservation Law – Abatement of pollution) § 71-2507 (McKinney 1997) (Pollution of Tidal Wetlands)
MIGRATORY BIRD STATUTES	1978 N.M. LAWS § 17-1-14 (General powers and duties of state game commission)	NY ENVIR. CONSERV. § 11-0307 (McKinney 1997) (Migratory game birds – regulation)

	NORTH CAROLINA	NORTH DAKOTA
WETLAND STATUTES	N.C CONST Art.14 § 5 (1973)(Conservation of natural resources) N.C. GEN STAT.: §113-230 (1999) (Orders to control activities in coastal wetlands) § 113A-113 (1999)(Areas of Environmental concern) § 113A-120 (1999)(Grant or denial of permits) §§ 143-214.8 – 143-214.13 (1999) (Wetlands Restoration Program)	N.D.CENT. CODE: § 20.1-02-17.1 (Supp. 1999) (Procedures and conditions for land acquisition for wildlife and fish restoration) §§ 61-32-01 – 61-32-06 (1995) (Wetlands Act) § 61-32-07 (Supp. 1999) (Wetlands Act) § 61-32-08 - 61-32-10 (1995) (Wetlands Act)
MIGRATORY BIRD STATUTES	N.C. GEN STAT.: § 113-129 (1999)(Wildlife resources – Definitions) § 113-270.2 (1999) (Hunting licenses)	N.D.CENT. CODE: § 20.1-03-25 (1991) (Hunting by nonresidents)

	NORTH CAROLINA	NORTH DAKOTA
	§ 113-270.2B (1999) (Voluntary migratory waterfowl conservation print) § 113-270.3 (1999) (Special activity licenses; big game kill reports) § 113-291.1 (1999)(Manner of taking wild animals and wild birds)	

	OHIO	OKLAHOMA
WETLANDS STATUTES	OHIO REV.CODE ANN.: § 1533.101 (Supp. 1999) (Reissued licenses and permit fees) §1533.112 (Supp. 1999) (Wetlands Habitat Stamps)	OKLA. STAT.: 2 § 9-205.3 (Supp. 2000) (Oklahoma Concentrated Animal Feeding Operations Act) 27A § 3-2-108 (1997) (Wetlands management strategy) 80 § 1 (1995)(State's consent to acquisition of lands by the United States)
MIGRATORY BIRD STATUTES	OHIO REV.CODE ANN.: § 1531.021 (Supp. 1991) (Sunday hunting prohibited) § 1533.101 (Supp. 1991) (Reissued licenses and permit fees)	OKLA. STAT.: 29§ 5-406 (1991) (Protected Game – Migratory Birds)

	OREGON	PENNSYLVANIA
WETLAND STATUTES	OR. REV. STAT.: § 196.600 (Supp. 1990) (Wetlands and rivers – definitions) §§ 196.605 – 196.660 (Supp. 1990) (Wetlands Mitigation Banks) §§ 196.668 – 196.687 (Supp. 1990) (Wetland conservation plans) § 197.279 (Supp. 1990) (Approved wetland conservation plans) § 215.418 (Supp. 1990) (Approval of development on wetlands) §§ 537.015 – 537.022 (1999) (Registration of water for wetland, stream or riparian restoration or storm water management)	2000 supp. PA CODE § 4212 (Aquacultural development – wetlands)

	OREGON	PENNSYLVANIA
MIGRATORY BIRD STATUTES		1997 PA CODE § 2103 (Game or wildlife protection)

	RHODE ISLAND	SOUTH CAROLINA
WETLAND STATUTES	R.I GEN. LAWS: §§ 2-1-18 – 2-1-24 (1998) (Fresh Water Wetlands) § 23-27.3-600 (1997) (State building code – fresh water wetlands)	S.C. CODE ANN: § 47-20-10 (Supp. 1999) (Confined Swine Feeding Operations – Definitions) §§ 48-39-10 – 48-39-355 (Supp. 1999) (Environmental protection and conservation – Coastal tidelands and wetlands)

	RHODE ISLAND	SOUTH CAROLINA
MIGRATORY BIRD STATUTES	R.I. GEN LAWS: § 20-2-34 (1998) (Fish and wildlife – licensing – definitions) § 20-2-35 (1998) (Fish and wildlife – licensing – Waterfowl stamp required)	S.C. CODE ANN: §1-30-75 (Supp. 1999) (Department of natural resources) § 50-9-510 (Supp. 1999) (licenses authorized for sale) § 50-9-530 (Supp. 1999) (Migratory waterfowl stamps; fees) § 50-11-20 (Supp. 1999) (Definitions; migratory waterfowl committee)

	SOUTH DAKOTA	TENNESSEE
WETLANDS STATUTES	S.D CODIFIED LAWS § 1-41-3.2 (Michie Supp. 2000)(Office of agricultural policy created)	TENN.CODE ANN.: §§ 11-14-401 (1999) – 11-14-407 (1999)(Natural Areas Protection Fund – wetlands)
MIGRATORY BIRD STATUTES	S.D CODIFIED LAWS § 41-1-1(Michie Supp. 2000)(Game, fish, parks and forestry – definitions and general provisions) § 41-3-6 (Michie 1991)(Assent to federal acquisition of property for migratory bird conservation)	TENN.CODE ANN.: § 70-5-111 (1995) (Federal wildlife refuges in the state)

	TEXAS	UTAH
WETLANDS STATUTES	TEX. HEALTH & SAFETY CODE ANN.: § 361.099 (West 1992) (Prohibition on permit for Hazardous Waste Management Unit in Wetlands) TEX NAT. RES. CODE ANN.: § 33.203 (West 2000 supp.) (Management of coastal public land – definitions) §§ 33.231 – 33.237 (West 2000 supp.) (Coastal Wetlands Acquisition Act) §§ 221.001 – 221.044 (West 2000 supp.) (Wetland mitigation)	

	TEXAS	UTAH
	TEX PARKS & WILD. CODE §§ 14.001 – 14.002 (West 2000 supp.) (Parks and wildlife department powers and duties concerning wetlands) TEX. WATER CODE §§ 11.501 – 11-506 (West 2000) (Wetlands Act)	
MIGRATORY BIRD STATUTES	TEX PARKS & WILD. CODE § 41.003 (West 1991) (Reciprocal License Agreements: Border States) § 43.154 (West 1991) (Hunting and fishing licenses – permits to control wildlife protected by this code)	UTAH CODE ANN.: § 23-21-6 (1998)(Acquisition of lands by the United States for migratory bird refuges)

	VERMONT	VIRGINIA
WETLANDS STATUTES	VT STATE ANN. tit. 10 § 902 (1998) (Soil and Water Conservation, Flood Control – Definitions) § 905b (Supp. 1999) (Soil and Water Conservation, Water Resource Management – Department of Environmental Conservation – Duties; Powers) § 1272 (1998) (Water Pollution Control – Regulation of activities causing discharge or affecting significant wetlands) VT STATE ANN. tit. 24 § 4303 (Supp. 1999) (Municipal and Regional Planning and Development – General Provisions; Definitions)	VA CODE ANN.: §§ 28.2-1300 – 28.2-1320 (Michie 1997) (Wetlands Act) § 33.1-223.2:1 (Michie 1996) (Wetlands mitigation banking) § 58.1-3666 (Michie Supp. 1998) (Wetlands and riparian buffers)

	VERMONT	VIRGINIA
MIGRATORY BIRD STATUTES	VT STATE ANN. tit. 10 § 1424a (1998)(Soil and Water Conservation; Flood Control – Outstanding resource waters) § 4277 (1997) (Fish and Wildlife Conservation – Migratory Waterfowl stamp program)	VA CODE ANN.: § 29.1-340 (Michie 1997) (Hunting waterfowl from unlicensed blinds and without season license) § 29.1-349 (Michie 1997) (Hunting, erecting blind within 500 yards of licensed blind) § 29.1-350 (Michie 1997) (Exemption from application of article)

	WASHINGTON	WEST VIRGINIA
WETLAND STATUTES	WASH. REV. CODE ANN.: § 90.84.005 (Supp. 2000) (Findings—purpose—intent of wetlands mitigation statute) § 90.84.010 (Supp. 2000) (Definitions) § 90.84.020 (Supp. 2000) (Authority for regulating) § 90.84.030 (Supp. 2000) (Submission of proposed rules to legislative committees) § 90.84.040 (Supp. 2000) (Certification of banks) § 90.84.050 (Supp. 2000) (Approval of use of credits by the departments)	W.VA. CODE : § 22-11-3 (1998) (Water Pollution Control Act – Definitions)

	WASHINGTON	WEST VIRGINIA
	§ 90.84.060 (Supp. 2000) (Interpretation of chapter) § 90.84.070 (Supp. 2000) (Application to public and private mitigation banks) § 90.84.900 (Supp. 2000) (Severability) § 36.32.570 (1991) (Conservation area acquisition and maintenance) § 47.12.3330 (Supp. 2000) (Advanced environmental mitigation) § 76.09.350 (Supp. 2000) (Multispecies landscape management plans) § 79A.05.775 (Supp. 2000) (Preservation of river wetlands)	

	WASHINGTON	WEST VIRGINIA
	§ 90.46.010 (Supp. 2000) (Definitions) § 90.46.044 (Supp. 2000) (Standards, procedures, and guidelines for discharge to wetlands) § 90.46.090 (Supp. 2000) (Use of reclaimed water into wetlands) § 90.74.030 (Supp. 2000) (Regulatory decisions)	

	WASHINGTON	WEST VIRGINIA
MIGRATORY BIRDS STATUTES	WASH. REV. CODE ANN.: § 77.08.045 (Supp. 2000) (Defines migratory waterfowl)	W.VA. CODE : § 20-1-2 (Supp. 1999) (Definitions) § 20-2-63 (1996)(Migratory waterfowl stamp) § 20-2B-9 (Supp. 1999) (Conservation stamp; purposes)

	WISCONSIN	WYOMING
WETLAND STATUTES	2000 Wisc. Legis. Serv. Act 147 (West 1999) (Wetlands Act) WISC. STAT.: § 1.13 (Supp. 2000) (Land Use and Planning activities) § 61.351 (2000) (Villages – Zoning of wetlands in shorelands) § 62.231 (2000) (Cities – Zoning of wetlands in shorelands) § 66.0295 (2000) (Comprehensive Planning) § 281.165 (Supp. 2000) (Compliance with water quality standards for wetlands)	Wyo. Stat. Ann.: § 35-11-308 - 35-11-311 (1999) (Wetlands Act) § 35-11-103 (Supp. 2000) (Definitions)

	WISCONSIN	WYOMING
	§ 281.22 (1999) (Fees for water quality determinations for wetlands)	
MIGRATORY BIRD STATUTES	WISC. STAT: § 29.364 (Supp. 2000) (Definition of migratory birds)	

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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24pp

QUESTION PRESENTED

The Army Corps of Engineers refused to grant the petitioner, a consortium of 23 municipalities, permission to turn an abandoned strip mine into a landfill. The Corps claimed jurisdiction over the site solely because migratory birds had been observed on the property.

Question presented: May the Corps, consistent with the Clean Water Act and the Commerce Clause of the U.S. Constitution, assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds?

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California Democratic Party v. Jones,
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FDA v. Brown & Williamson,
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Gibbons v. Ogden,
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Kidd v. Pearson,
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Lopez v. United States,
514 U.S. 549 (1995) 4, 15

New York v. United States,
505 U.S. 144 (1992) 10

Printz v. United States,
521 U.S. 898 (1997) 10

Troxel v. Granville,
68 U.S.L.W. 4458 (2000) 10

United States v. Morrison,
68 U.S.L.W. 4351 (2000) 1, 4, 7, 15

Wickard v. Filburn,
317 U.S. 111 (1942) 15

Statutes

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Constitutional Provisions

U.S. Const. Amend X 9

U.S. Const. Amend. XVI 17

U.S. Const. Art. I, § 1 17

U.S. Const. Art. I, section 8, clause 3 ..... passim

U.S. Const. Art. II, § 1 ..... 3, 17

U.S. Const. Preamble 2, 13

Founding Documents

1 Madison, James, Journal of the Federal Convention
362 (2d ed. 1893) 14

Declaration of Independence 1

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and those inalienable rights that were conferred by the Creator and which are acknowledged in the Declaration of Independence. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our briefs to date, we have argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, limit the powers of Congress over States. In our briefs in *United States v. Morrison*, 68 U.S.L.W. 4351 (2000) and *Jones v. United States*, 68 U.S.L.W. 4422 (2000), we explained how the Founders' notion of "separate incompetence" limits the power of Congress over private intrastate activity. In this brief, we bring together the complementary strands of "dual sovereignty" and "separate incompetence" in an effort to return to the *strong* yet *limited* federal government our Founders established.

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae* or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

The vertical separation of powers between the State and federal governments is one of the structural guarantees of liberty within our Constitution. Another equally important safeguard of our freedom is the horizontal separation of powers between the coordinate branches of the federal government. That horizontal separation is threatened whenever one branch of government arrogates to itself the powers that our Founders placed exclusively in other hands.

Our Founders established a federal government with enumerated, and separated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people. If unelected elites can change the meaning of the Constitution, then we cease to be self-governing citizens and become, instead, the subjects of someone else's governance.

SUMMARY OF ARGUMENT

This case turns on the meaning of two constitutional phrases and one statutory term. The terms are:

- What is "commerce ... among the several States," as it appears in the United States Constitution in Article I, section 8, clause 3?

- What is "the executive power of the United States," as it appears in the first sentence of Article II, section 1?

- What are "the navigable waters" of the United States, as that term appears in the Clean Water Act, 33 U.S.C. § 1344?

If *any* of these terms are used in their ordinary sense, the judgment of the Seventh Circuit must be reversed. If all of these terms are twisted out of recognition to uphold federal power over private property, then perhaps our national experiment with limited government and separated power should be declared a failure.

There is some reason to be optimistic. Recent cases suggest that there is still some life in our Founders' original concept of limited government. In *Jones v. United States,* 68 U.S.L.W. 4422 (2000), this Court unanimously rejected an Executive Branch attempt to expand Commerce Clause legislation to the greatest possible extent. The Department of Justice had argued that a private residence was a building that was "used in or affecting interstate commerce," because it was financed with an out-of-state mortgage, insured by an

out-of-state insurer, and heated by out-of-state natural gas. The defendant, Dewey Jones, was sentenced to 30 years under the federal arson statute instead of the 10 year maximum penalty for the same offense under Indiana law. The government admitted that there must be some kind of nexus between interstate commerce and the predicate act, but argued that the government neither had to prove that there was an "*actual effect*" on commerce nor a "substantial effect" in each case. Brief for United States at 13, *Jones, supra* (No. 99-5739) [*emphasis in original*]. Every member of this Court recognized and rejected this threat to individual rights.

The Department of Justice prosecuted Dewey Jones under the federal arson statute because, for almost half a century, there have been no meaningful limits to Congress's power under the Commerce Clause. That began to change when this Court declared the "substantial effects" test in *Lopez v. United States*, 514 U.S. 549 in 1995. And after this Court's decision in *United States v. Morrison*, *supra*, one could no longer safely assume that Congress can regulate *anything* under the guise of commerce. For the first time since 1942, this Court has begun to insist that the power to regulate interstate commerce is part of our overall system of *limited* and *enumerated* powers. This is a time of transition.

At a time of transition like this, we suggest a long, careful look at the very first important Commerce Clause case: *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). It was an historic case in every sense of the word. The parties were fighting over a steamboat monopoly that was originally granted to Robert Fulton, the inventor of the steamboat. Daniel Webster argued the winning side. Chief Justice John Marshall wrote the majority opinion. *Gibbons* introduced a broad reading of the Commerce Clause that won the respect of the founding generation.

But *Gibbons* did not introduce an unlimited reading of the Commerce Clause. Chief Justice Marshall identified a *textual* limit on Congress's power and a *political* limit. Marshall took the text of the Constitution as he found it, rejecting both an "enlarged construction" and a "strict construction" of the words the Founders chose. He pointed to the political restraints built into the Constitution. The political accountability of the elected legislature is the only real restraint on some of the enumerated, yet plenary powers of Congress. This is a structural guarantee of liberty, and a vital part of our constitutional separation of powers.

Marshall's two restraints--the textual and the political--provide all the guidance this Court needs to resolve this case. Congress has enacted legislation intended to protect the navigable waters of the United States. A coordinate branch of government has construed "the navigable waters" so broadly as to include water-filled ditches on an abandoned strip mine in the Chicago suburbs, on the theory that migrating birds affect interstate commerce enough to create congressional power over these puddles. No Congressman has ever had to defend a vote for or against this startlingly broad reading of the Commerce Clause, however. It is the EPA that proclaimed the "migratory bird rule" that produced this result, and the Army Corps of Engineers that denies the permits on this basis.

We believe that John Marshall's emphasis on plain language and political accountability mandate a reversal of the decision below. The question here, as in last term's case of *FDA v. Brown & Williamson*, 68 U.S.L.W. 4194 (2000) is not what Congress *might* do to regulate commerce, but what the Executive Branch can do with a statute Congress has enacted for another purpose altogether. The question in *Brown & Williamson* was whether the FDA could unilaterally de-

fine tobacco as a "drug." The question in this case is whether the EPA can redefine water-filled ditches into "navigable waters." If we still believe in plain language and political accountability, the answer in this case has to be no. We therefore urge this Court to overturn the decision of the Seventh Circuit.

ARGUMENT:

BOTH THE TEXTUAL AND THE STRUCTURAL RESTRAINTS OF THE CONSTITUTION PROHIBIT THE EXECUTIVE BRANCH FROM EXPANDING THE STATUTORY TERM "NAVIGABLE WATERS" TO INCLUDE WATER-FILLED DITCHES ON AN ABANDONED STRIP MINE

A. *GIBBONS V. OGDEN* IS A SOUND FOUNDATION FOR A TWENTY-FIRST CENTURY UNDERSTANDING OF THE COMMERCE CLAUSE

In the twentieth century, America endured a World War and a Great Depression, a New Deal and another World War, a struggle for civil rights at home and a Cold War against communism. A century of struggle turned this nation into the world's lone superpower, but it led us far from our Founders' original vision of limited and enumerated federal powers. The question for the twenty-first century will be whether the federal government will continue its twentieth-century trend until it absorbs and consumes every lesser center of power, or whether America will rediscover the dual sovereignty our Founders originally envisioned.

This Court's 1999 term suggests that our Founders' vision may yet prevail. For the first time in decades, the Court placed real limits on Congress's power to expand the meaning of the Constitution and on the Executive's power to expand the meaning of statutes. *Morrison, supra*; *Brown & Williamson, supra*. There were those who were quick to criticize these rulings as "judicial activism." The Court can be active, however, without being activist. It is not activism

for this Court to exercise *its* constitutional powers when the coordinate branches of government go far beyond the boundaries of *theirs*.

If nothing ever changed, there would be no need for an active Court. But changing times require changing rules to protect unchanging values. For example, in the face of the totalitarian regimes of the 20th Century, America had to concentrate all its force into a single fist in defense of liberty.[2] But to defend liberty today, now that the threat has passed, we must exchange that fist of war for the open hand of peace.

In changing times like these, we do well to consider other times of transition. This *amicus* believes that the early twenty-first century is an ideal time to rediscover the wisdom

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[2] Justice Jackson touched on this concept in his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944). He wrote:

> When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

Korematsu, 323 U.S. at 244 (Jackson, J., *dissenting*).

of the early nineteenth century, and, in particular, the wisdom of Chief Justice John Marshall in *Gibbons v. Ogden*.

The times are more similar than one might think. In 1824, the world had just regained its breath after the terrifying years of the Napoleonic Wars, a struggle that rocked all of Europe and sucked America into the War of 1812. America was just beginning to see daylight after a long dark economic night that began with the crippling debts of the Revolutionary War. The next generation promised to be good for the still-young nation.

In the year 2000, the world has just regained its breath after a Cold War that affected the whole world. The threat of "mutually assured destruction" is fading away like a bad dream, and Americans wake up in the morning bent on the pursuit of happiness instead of the global struggle to preserve life and liberty. Our national debt is still in the trillions, but the ink in Washington is black instead of red, these days. For the first time since our nation was very young, we have the freedom to rediscover the untapped potential of America's unique system of dual sovereignty.

For we have yet to unleash the full promise of our constitutional system. Although this Court often speaks of the States as "laboratories of democracy," we have yet to achieve the possibilities of that phrase. The Tenth Amendment speaks to a system where self-governing individuals exercise individual liberties; self-governing States exercise wide-ranging sovereign powers; and a strong but limited federal government increases the security and prosperity of all without intruding upon the protected rights of any.

This Court has recently begun to move in that direction. Some critics have been quick to label these as "States' rights"

decisions, but that is a mistake. These recent decisions do not just limit the federal government in order to benefit the States. Instead, the Court has begun to revive the concept of self-government at every level: limiting federal power to promote self-governing States, and limiting State power to protect self-governing voluntary associations. *See, New York v. United States,* 505 U.S. 144 (1992) (federal government cannot co-opt State legislatures); *Printz v. United States*, 521 U.S. 898 (1997) (Congress cannot co-opt local law enforcement officials); *Boy Scouts of America v. Dale*, 68 U.S.L.W. 4625 (2000) (States cannot prohibit voluntary associations from choosing their own leaders); *California Democratic Party v. Jones*, 68 U.S.L.W. 4604 (2000) (States cannot force political parties to let members of other parties choose their candidates); *Troxel v. Granville*, 68 U.S.L.W. 4458 (2000) (States cannot force parents to allow visitation with any third party). These cases all reverse the 20th Century trend towards centralized power, replacing it with a new paradigm of self-government.

B. CHIEF JUSTICE JOHN MARSHALL BELIEVED IN SEPARATE, SOVEREIGN GOVERNMENTS WITH SEPARATE, PLENARY POWERS

That "new" paradigm, however, is hardly new. Our Founders believed in self-government. They assumed that households, churches, voluntary associations, towns, cities, counties, and States would all be able to govern themselves. They recognized, however, that there were some things that State and local governments could not handle on their own, and so they established a self-governing Union of thirteen States to do what the States were separately unable to accomplish. That federal Union was an experiment in government that has succeeded beyond their wildest expectations.

Chief Justice John Marshall had a bold, clear vision of how the new Constitution should work. Central to that vision was his concept of the relationship between the people, the States, and the new federal government. Marshall insisted that the new Union was not created by the States, and it did not merely exercise a subset of powers delegated by the States. Instead, the new government was created directly by the people themselves. This meant that the sovereign power was *separated*, not *delegated*.

This concept of separated sovereignty is crucial to understanding Marshall in *Gibbons*. The losing party in that case had urged the Court to apply a "strict construction" to the Constitution, arguing that the power to regulate commerce was an express delegation of power from the States, and that any express delegation of power should be strictly construed. *Gibbons*, 22 U.S. (9 Wheat) at 43. Chief Justice Marshall rejected the premise that the federal government was exercising powers delegated by the States. He identified a change that Justice Kennedy has since aptly called "splitting the atom of sovereignty," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1994) (Kennedy, J., *concurring*). Marshall wrote:

> When these allied sovereigns [the States] converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consid-

> eration of the instrument by which that change was effected.

Gibbons, 22 U.S. (9 Wheat) at 187.

Marshall did not view the federal government as the child of the State governments, depending for its existence on a meager allowance of power. But that did not mean he viewed the States as mere "departments" of an all-consuming federal government, either. In Marshall's view, the *people* were ultimately sovereign, and the Constitution was the instrument by which a sovereign people divided power between State and federal governments, and between the various branches of the new federal government.

C. CHIEF JUSTICE MARSHALL REJECTED BOTH A "STRICT CONSTRUCTION" AND AN "ENLARGED CONSTRUCTION" OF THE CONSTITUTIONAL TEXT

Marshall believed that all power resided ultimately with the people, but that power was dormant until delegated. Marshall saw no reason for leaving power untapped:

> The grant [to Congress] does not convey power which might be beneficial to the grantor [the people], if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.

Gibbons, 22 U.S. (9 Wheat) at 189.

Because of this view, Marshall roundly rejected arguments for a "strict construction" of the Constitution. He did not do this in a way that would trouble modern "strict constructionists," however. In fact, Marshall's rejection of a "strict construction" is a powerful argument in favor of this *amicus'* understanding of what is now known as "strict constructionism." Marshall said:

> What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle.

Gibbons, 22 U.S. (9 Wheat) at 188.

This *amicus* does contend against any "enlarged construction, which would extend words beyond their natural and obvious import." "Interstate commerce" does not naturally and obviously include the flight of migratory birds. "Navigable waters" do not naturally and obviously include water-filled ditches on an abandoned strip mine. Chief Justice John Marshall might question whether this should properly be called "strict construction," but he would not controvert the principle.

Rejecting such an "enlarged construction" does not deprive Congress of the power to do what America needs. Marshall would not "cripple the government, [and] render it unequal to the object, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent." *Gibbons*, 22 U.S. (9 Wheat) at 188. The objects of the Constitution are eloquently set forth in the Preamble of that document, and include both the promotion of

the General Welfare and the preservation of the Blessings of Liberty. Congress can and should pursue both of these objects.

Marshall's concept of legislative power is consistent with the original draft resolution that the Framers adopted at the very beginning of the Constitutional Convention. At an early stage of the Convention, the delegates adopted a definition of the "the legislative power of the United States" that included the power to legislate on every subject for which the States were "severally incompetent."[3] 1 Madison, James, Journal of the Federal Convention 362 (2d ed. 1893) [hereinafter, "Madison's Journal"]. That broad definition was subsequently refined to the enumerated list of powers now found in Article I, section 8. Marshall's robust interpretation of the enumerated powers was completely consistent with the original concept of "separate incompetence."

The Clean Water Act is a good example of legislation for which the States would have been separately incompetent. Water pollution is no respecter of State boundaries. Agricultural pesticides that drain into the headwaters of the Mississippi flow past every State on that river from Minnesota to Louisiana; sludge from the mines at the western end of Lake Superior runs through all five of the Great Lakes before reaching the Saint Lawrence Seaway; and a pig farm in the Virginia tidewater can affect algae across the Chesapeake Bay in Maryland. The States cannot reliably solve such problems one by one. But, under a separate incompetence standard, the United States *can*.

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[3] This *amicus* has previously addressed the history and implications of the "separate incompetence" standard, with a particular emphasis on *Gibbons*, in our brief in *Jones, supra,* (No. 99-5739), pp. 5-16.

The Court has begun to note the difference between problems that are truly national and those that are merely nationwide. Truly national problems need a truly national solution, but there are nationwide problems that are truly local, which can be just as easily addressed by a range of differing solutions at the State or local level. We believe that the protection of non-migratory species may well fall into this latter category, but the protection of migratory species necessarily falls into the former.

The fact that migrating wildlife is a matter of truly national concern does not mean that Congress can protect migratory birds by just calling them "commerce," however. The Commerce Clause has had a long and twisted history. For a while, "commerce" seemed to include very little. *See Kidd v. Pearson*, 128 U.S. 1 (1888) ("manufacturing" is not "commerce"); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (prohibiting interstate shipment of goods produced by child labor is a regulation of production, not of commerce). Later, it seemed to include almost anything. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown on one's own land and fed to one's own chickens can be regulated as "interstate commerce"). On the whole, however, Commerce Clause jurisprudence has not progressed much beyond Marshall's early formulation. Congress currently seems to exercise plenary power over economic activity that affects more States than one, subject only to the political checks of the ballot box.

This Court's recent cases fit with Marshall's broad but not unlimited theory of the Commerce Clause. A plenary power over commerce does not give Congress power over things that are not commerce, like rape, *Morrison*, *supra*, or the mere presence of firearms near a school, *Lopez*, *supra*. Congress might therefore rely upon something other than the

power to "regulate ... commerce among the several States" to protect migratory birds.[4]

D. THE ELECTED LEGISLATURE SHOULD EXPRESS THE WILL OF THE PEOPLE, AND THE EXECUTIVE BRANCH SHOULD CARRY IT OUT.

Marshall believed in a limited but strong government. "[T]he sovereignty of Congress, though limited to specific objects, is plenary as to those objects." *Gibbons*, 22 U.S. (9 Wheat) at 197. When it came to the power over commerce among the several States, Marshall relied primarily upon the nature of representative government to determine those limits:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints

[4] Free market conservationists argue that a system of economic incentives can accomplish the goal of protecting wildlife far better than any system of regulatory control. Under the current system, property owners are subject to severe loss whenever migratory birds may be attracted to water on their land. The prudent property owner should therefore take steps to make sure his or property cannot benefit birds. But this is madness! In a system of well-designed economic incentives, the prudent property owner would look for the optimal fit between human use and bird use , resulting in a greatly expanded range of habitats for migratory birds. Only Congress can authorize the tax credits or appropriations that would be necessary to unleash the power of the free market, however. Upholding the EPA's power in this case takes away Congress's incentive to create such economic incentives.

> on which the people must often rely solely, in all representative governments.

Gibbons, 22 U.S (9 Wheat) at 197.

Many commentators have noted that our government combines the best features of democracy (in Congress), monarchy (in the Presidency), and aristocracy (in this Court). Our Founders concentrated the executive power of the United States in a single head because the Executive Branch only *carries out* the will of the people, as that will has been expressed by Congress. It is Congress, and only Congress, that can exercise the legislative powers vested by the Constitution. U.S. Const. Art. I, § 1. If the executive power of the United States includes a power to rewrite the laws, however, the monarchical branch can oppose the will of the people instead of carrying it out. Thus the executive might be transformed from a monarchical servant of the people into a legislative tyrant of the people.

Political accountability is one of our structural guarantees of freedom. If Congress can protect the "waters of the United States" and leave it up to the EPA to define those "waters" under the broadest possible interpretation of the Commerce Clause, then Congress could just as easily lay claim to the "money of the United States" and leave it up the IRS to decide what that is under the broadest possible interpretation of the Sixteenth Amendment. And since that Amendment allows Congress to "lay and collect taxes on incomes, from whatever source derived," that broadest possible interpretation would allow the IRS to claim every penny any American ever earned. We dare not leave the scope of congressional power to be determined by the Executive Branch.

Marshall's concept of political checks on the plenary commerce power took on new life in two recent decisions. In *Brown & Williamson*, *supra*, five members of this Court refused to defer to an Executive Branch rule that expanded the term "drug" to include tobacco. And in *Jones*, *supra*, every member of the Court agreed that the Justice Department was wrong to construe the term "in or affecting interstate commerce" so broadly as to convict a man for throwing a Molotov cocktail into his cousin's living room.

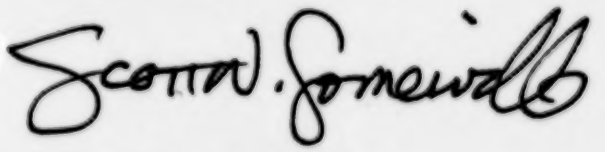
This last precedent, all by itself, should be sufficient to determine the outcome of this case. This Court unanimously overturned the conviction of Dewey Jones, even though the Executive Branch construed a Commerce Clause statute so broadly that almost every building in America "affected interstate commerce." Now, the Executive Branch is trying to convert almost any puddle in America into "navigable waters." Some people may value the liberty of a petty arsonist more than the property of a consortium of Chicago suburbs. Nevertheless, the constitutional principles of limited government, separation of powers, and individual rights are the same, whether what is at stake in the case is 20 extra years in jail or the right to develop a landfill. This Court did the right thing when it ruled against the Department of Justice in favor of a convicted arsonist like Dewey Jones. The right thing now is to rule against the Army Corps of Engineers and set 23 municipalities free to convert an abandoned strip mine into a landfill.

CONCLUSION

John Marshall believed in plain language and political accountability. Those two principles are all that are needed to determine the outcome of this case. There are a number of ways that Congress can protect the habitat of migratory

birds, but all of them require elected legislators to justify their actions to the voters. There is no such accountability when unelected Executive Branch officials stretch the term "navigable waters" to include the water-filled ditches on an abandoned strip mine. The EPA, just like the FDA in *Brown & Williamson, supra*, has twisted the plain language of statutes to mean something altogether other than what Congress originally intended. This is an unconstitutional exercise of the legislative power of the United States, which this Court should reject. We therefore urge this Court to overturn the decision below.

Respectfully Submitted,



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Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF CALIFORNIA, IOWA, MAINE, NEW JERSEY, OKLAHOMA, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Andrus v. Allard, 444 U.S. 51 (1979) 27

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 18, 19

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987) 28

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 18, 19

Chemical Waste Management v. Hunt, 504 U.S. 334 (1992) 10

Cooley v. United States, 46 Fed. Cl. 538 (2000) 10

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) 18, 19

Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) 9

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8

Gibbs v. Babbitt, 214 F.3d 483 (2000) 20

Hartsell v. *United States*, 127 F.3d 343 (1997), *cert. denied*, 523 U.S. 1030 (1998) 20

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 24

Hill v. Boy, 144 F.3d 1446 (11th Cir. 1998) 9

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Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) 14, 19, 24, 28

Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993).....9, 17

Hughes v. Oklahoma, 441 U.S. 322 (1996) 19

Maryland v. Wirtz, 392 U.S. 183 (1968)..... 7

Michigan Peat v. United States Environmental Protection Agency, 175 F.3d 422 (6th Cir. 1999) 9

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 27

Monongahela Power Company v. Marsh, 809 F.2d 41 (D.C.Cir. 1987) 9

National Association of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C.Cir. 1997), *cert. denied*, 524 U.S. 957 (1998)..... 20

National League of Cities v. Usery, 426 U.S. 833 (1976) 8

North Dakota v. United States, 460 U.S. 300 (1983) 27

Perez v. United States, 402 U.S. 146 (1942) 8, 14

Philadelphia v. New Jersey, 437 U.S. 617 (1978).....10, 18

Printz v. United States, 521 U.S. 898 (1997)..... 2

Proyect v. *United States*, 101 F.3d 11 (2d Cir. 1996) 8

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999)..... 9

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 10

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Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000)..... 22

United States v. Brace, 41 F.3d 117 (3d Cir. 1994)..... 9

United States v. Deaton, 209 F.3d 331 (4th Cir. 2000) 9

United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996)..... 20

United States v. Darby, 312 U.S. 100 (1941)..... 24

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, ___ U.S. ___, 120 S.Ct. 1740 (2000)..... *passim*

United States v. *Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).....8, 20

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 9, 14, 16, 20

United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 9

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) 9

Wickard v. Filburn, 317 U.S. 111 (1942)..... 11

CONSTITUTION

United States Constitution Commerce Clause.... *passim*

FEDERAL STATUTES & REGULATIONS

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16 U.S.C.
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42 U.S.C.
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§§ 9601-9675 19
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§§ 6901-6992k 19

Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) 22

TABLE OF AUTHORITIES – Continued

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33 C.F.R
§ 323.2(f) 10
§ 323.5 26

42 Fed. Reg. 26,961 (May 24, 1977) 24

65 Fed. Reg. 12,818 (Mar. 8, 2000) 11

STATE STATUTES & REGULATIONS

California Fish & Game Code
§ 2785(g) 7

California Public Resources Code
§ 30121 7

California Code of Regulations, Title 14
§ 15226 25

Connecticut Gen. Stat.
§ 22a-29(2) 7

20 Illinois C.S.A.
§ 830/1-6 7

District of Columbia Code
§ 6-921(27) 7

Kentucky Rev. Stat.
§ 146.550(1) 7

Massachusetts Ann. Laws, ch. 131
§ 40 7

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Maryland Env. Code

§ 5-901(f) 7

New Hampshire Rev. Stat.

§ 482-A:2 7

Nebraska Rev. Stat.

§ 244.388 7

Oregon Rev. Stat.

§ 196.800(16) 7

Texas Nat. Res. Code

§ 221.001(6) 7

Virginia Code Ann.

§ 62.1-44.3 7

Wisconsin Stat.

§ 23.32(1) 7

Delaware Code Ann., Tit. 7

§§ 6601-6620 23

Georgia Code Ann.

§ 12-5-280 23

Michigan Comp. Ann.

§§ 281.683-685 23

§§ 281.701-722 23

§§ 322.701 et seq. 23

TABLE OF AUTHORITIES – Continued

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OTHER AUTHORITIES

Cal. Travel and Tourism Comm'n, *Fast Facts 2000* (2000) 18

California Wetlands Information Systems, <http://ceres.ca.gov/wetlands/geoinfo/vernal_pools> 25

Chicago Tribune, Aug. 13, 2000 18

Demissie, et al., *Influence of Wetlands on Streamflow in Illinois, Ill. State Water Survey* 15

Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals, Wetlands*, Vol. 13, No. 1, Mar. 1993 17

Houck & Rolland, *Environmental Federalism in Wetlands Regulation*, 54 Md.L.Rev. 1242 (1995) 15, 17

Ill. Dept. of Natural Resources, *Nationwide Survey of State Wetland Regulatory Programs* (Oct. 1997) 23

Kettering, *Praise for General Permits*, National Wetlands Newsletter, Vol. 16, No. 4, July/Aug. 1994 26

Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, Prepared for the Association of State Wetland Managers (1995) 25, 26

Kusler, et al., *Wetlands, Scientific American* (Jan. 1994) 21, 23

McClurg, *The Klamath River Basin: A Microcosm of Water in the West*, Western Water Magazine, May/June 2000 22

N.Y. Times, July 20, 1993 16

Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984) ... 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

San Francisco Bay Conservation and Dev. Comm'n, 1999 Annual Report..... 26

Southwick Associates, *The Economic Benefits of Watchable Wildlife Recreation During 1996 in Illinois* (1998)..... 22

Stewart, *Technical Aspects of Wetlands as Bird Habitat*, U.S.G.S. Water Supply Paper 2425 16

The Economic Value of Wetlands, Wetlands' Role in Flood Protection in Western Washington, Wash. Dept. of Ecology, Oct. 1997 15

Costanza, et al., *The Value of the World's Ecosystem Services and National Capital*, Nature, Vol. 387, May 15, 1997..... 16

U.S. Fish and Wildlife Service, *1994 Update to the North American Waterfowl Management Plan* 16, 17

U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife Associated Recreation*..... 17

U.S. Fish and Wildlife Service, *The Economic Importance of Hunting* (1998)..... 17, 18, 22

Zinn and Copeland, *Wetland Issues*, Congressional Research Service Issue Brief, May 1, 2000..... 29

INTERESTS OF AMICI CURIAE

Scientific and technological progress has brought with it an increased awareness that the cumulative effects of many isolated human activities have serious consequences for the environment. Not that long ago, it would have been considered implausible to suggest that spraying an aerosol can damaged the earth's atmosphere, that eating a hamburger contributed to the loss of rain forest, or that filling a small "depression" of water harmed wildlife. Despite this growing awareness, our knowledge of how human intervention in the environment affects the nation remains imperfect. Translated into constitutional terms, it means that, in a world with few certain answers, courts should be extremely reluctant to find that Congress is powerless to determine that a particular environmental harm affects the national economy and requires a national solution. Unless the legislative judgment is truly irrational, it should be left to the political process to decide whether Congress has gone too far.

In this case, Congress made a rational judgment, supported by a wealth of compelling evidence, that a national response to prevent the degradation of the nation's remaining wetlands was necessary. The individual States benefit from this national approach. The harmful effects of wetland destruction – such as impaired water quality, increased flooding, reduced ground water supply, and the destruction of wildlife habitat – do not respect interstate boundary lines. Wisely employed, federal regulation insures a measure of protection for the nation's wetlands and helps reduce the cumulative impacts that the placement of fill in one State may have on the environment and economy in other States. Federal regulation supplements the efforts of those States that

have wetland regulations, and fills the regulatory vacuum in others that have chosen not to adopt their own wetland programs.

The protection of migratory birds provides a perfect subject for federal regulation. No matter how comprehensively one State were to regulate wetlands, its regulation would never be able to adequately protect migratory birds whose survival necessarily depends on regulation that insures the supply of wetland habitat in many States. Migratory birds, like wetlands themselves, are a type of interstate resource whose loss would have substantial repercussions on the economies of the States. Although the individual States can take action to protect these resources within their borders, only the federal government can insure that the States' interests in these interstate resources are fully protected by a national regulatory scheme.

From time to time Congress has improperly imposed its will on the States, and this Court has stepped in when necessary to remind Congress of the appropriate boundaries of federalism. *E.g., Printz* v. *United States*, 521 U.S. 898 (1997). But this is not one of those cases. Congress made a policy judgment to address the impacts that the filling of millions of acres of wetlands would have on the nation's health and economy. This was a conventional exercise of federal environmental regulation, not land use planning traditionally reserved to the States. There may be times when wetland regulation under section 404 will duplicate or conflict with the approach taken by an individual State. Any such policy disputes should be worked out within the political system, however, and not be converted into a constitutionally-mandated prohibition on Congress' ability to respond to a national environmental crisis.

SUMMARY OF ARGUMENT

1. An analysis of the validity of legislation under the Commerce Clause begins with a definition of the class of activity being regulated. In this case, Congress defined the relevant class of activity as the discharge of dredged or fill material into "navigable waters" as defined in the Act. The petitioner incorrectly assumes that the relevant class of activity is limited to wetlands subject to the "migratory bird rule." This approach improperly narrows Congress' classification because the Act does not distinguish among subcategories of wetlands and rationally treats the discharge of dredged or fill material as a single subject of national concern.

2. The decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, ___ U.S. ___, 120 S.Ct. 1740 (2000) set limits on Congress' authority to regulate noneconomic activity under the Commerce Clause. But the placement of fill – an activity typically associated with commercial development or public works projects – is economic activity. Because the class of activity being regulated is economic, it is permissible to aggregate the impacts of the activity to determine whether the regulated activity has an impact on interstate commerce, even if the particular activity itself is intrastate and even if, in trivial instances, it has no discernible impact on interstate commerce. The deposition of dredged or fill material in wetlands, with its resulting adverse impacts on water quality, flood control, erosion control and wildlife, has substantial effects on interstate commerce. Even if the Court were to consider only the impacts of the "migratory bird rule," there is a rational basis for concluding the destruction of migratory bird habitat would have a substantial impact on interstate commerce.

3. Because the filling of wetlands has significant interstate impacts, federal wetlands regulation is both appropriate and necessary. In addition to protecting the citizens of one State from the consequences of wetlands fill that occurs in another State, federal wetlands regulation supplements existing State regulation and provides the States with additional resources and expertise. Federal, State and local governments are working together to improve the regulatory process, and are capable of resolving any policy conflicts through the political process.

4. Federal regulation of the filling of wetlands does not intrude into an area of traditional State concern. The federal government long has legislated in the field of pollution control and resource protection. This environmental regulation embodied in the Clean Water Act does not dictate land uses and is fundamentally different than the planning and zoning functions traditionally reserved to the States.

ARGUMENT

I. THE PLACEMENT OF DREDGED OR FILL MATERIAL IN THE WATERS OF THE UNITED STATES IS A CLASS OF ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

A. *Lopez* and *Morrison* Require Close Scrutiny of the Regulation of Noneconomic Activity

The Court's recent decisions in *Lopez* and *Morrison* were significant for at least two reasons. The decisions imposed substantive outer limits on the reach of Congress' authority under the Commerce Clause, and they emphasized that while judicial scrutiny of legislation under the Commerce Clause remains highly deferential,

the courts have an obligation to review Congress' observance of the clause's limitations. Although the Court found the federal statutes in *Lopez* and *Morrison* deficient for a number of reasons, the critical analytical distinction was that the statutes regulated what the Court found to be essentially "noneconomic" activity. *Lopez*, 514 U.S. at 560-561; *Morrison*, ___ U.S. ___, 120 S.Ct. at 1750 ("the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]"). Where noneconomic activity is involved, it is necessary to show that the activity itself has a direct impact on interstate commerce. *Lopez*, 514 U.S. at 559-61; *Morrison*, ___ U.S. ___, 120 S.Ct. at 1751. Where statutes regulate economic activity, Congress may regulate the activity if, in the aggregate, the activity has a substantial effect on interstate commerce, even if the particular activity in question involves solely intrastate activity and even if its impacts would be deemed trivial. *Id.*

The federal legislation at issue in *Lopez* and *Morrison* understandably prompted the concern of the Court. Both statutes regulated what was essentially noneconomic activity (the possession of handguns and gender-related violence) and both arguably required the piling of inferences to explain why these activities affected the commerce of the country. The Court found that these statutes exceeded the outer limits of the Commerce Clause because neither directly touched economic activity and both relied on an analytical path that would have swept every topic of legislation within congressional reach.

B. The Relevant Class of Activity Is the Placement of Dredged or Fill Material in Navigable Waters

Despite the restrictions announced in *Lopez* and *Morrison*, the regulation at issue in this case fits comfortably

within the permissible scope of the Commerce Clause power. Any analysis regarding the scope of congressional authority under the Commerce Clause begins with an identification of the class of activity being regulated. The activity being regulated here is neither navigable waters nor the movement of migratory birds. The class of activity being regulated is that for which a permit is required: the "discharge of dredged or fill material" into navigable waters as defined by the Act. 33 U.S.C. § 1344(a).

The petitioner assumes that the relevant class of activity is the filling of wetlands that are used by migratory birds because the wetlands on its property happened to fall into this particular subcategory of section 404 permit jurisdiction. If the petitioner's approach to classification were accepted, the filling of every subcategory of wetlands – prairie potholes, vernal pools and the like – would be subject to a separate Commerce Clause analysis, and the federal government would be required to justify separately why each particular subcategory of wetlands bore the requisite impact on interstate commerce. Section 404, however, does not discriminate among categories of wetlands; it applies to the placement of dredged or fill material in any waters within the scope of the Act.[1]

There is a rational basis supporting this broader classification. The purposes of the Clean Water Act, 33 U.S.C.

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[1] Under the petitioner's approach, a separate Commerce Clause challenge could be launched for each of the more than 1,000 listed endangered species. Aside from the enormous burden this approach creates for the courts, these efforts to segment Congress' broader scheme into subclasses understate the impacts of the activity being regulated and conflict with the principle that economic activities must be reviewed for their aggregated effects on interstate commerce.

§ 1251, apply to all wetlands because all wetlands, including isolated wetlands, perform the same beneficial functions such as water quality protection, flood control, erosion control and the preservation of wildlife habitat. *See* pp. 15-19, 21-22 *infra*. This approach also conforms to that taken in most wetland legislation, which treats wetlands as a single resource to be protected and does not distinguish between isolated and nonisolated wetlands. *See, e.g.*, Cal. Pub. Resources Code § 30121 (broadly defining wetlands without distinguishing between isolated and nonisolated wetlands); Cal. Fish & Game Code § 2785(g); Conn. Gen. Stat. § 22a-29(2); D.C. Code § 6-921(27); 20 Ill.C.S.A. § 830/1-6; Ken. Rev. Stat. § 146.550(1); Mass. Ann. Laws ch. 131, § 40; Nebr. Rev. Stat. § 244.388; N.H. Rev. Stat. § 482-A:2; Ore. Rev. Stat. § 196.800(16); Tex. Nat. Res. Code § 221.001(6); Va. Code Ann. § 62.1-44.3; Wis. Stat. § 23.32(1); *but cf.* Md. Env. Code § 5-901(f) (defining "isolated nontidal wetland"). That the Corps chose to subcategorize various types of wetlands for administrative purposes does not alter this conclusion. The migratory bird rule is just one essential part of a "larger regulation" to protect the nation's waters from the environmental and economic impacts of fill, *see Lopez*, 514 U.S. at 561, and its impacts should not be singled out and scrutinized in isolation from the impacts of the other activities subject to section 404's permit requirement.

This broader approach to classification honors the language of section 404. It also is consistent with the Court's approach under the Commerce Clause, which has analyzed the generic activity that is the subject of the regulation and not some narrowly-defined activity that is a subset of the congressional scheme. *See Maryland* v. *Wirtz*, 392 U.S. 183, 197 n. 7 (1968), *overruled on other*

grounds, National League of Cities v. *Usery*, 426 U.S. 833 (1976), *overruled by Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (recognizing the power of Congress "to declare that an entire class of activities affects commerce"); *Perez* v. *United States*, 402 U.S. 146, 152-54 (1942) (emphasizing need to analyze the impacts of a "class of activities"). This approach has been followed by the lower courts, which have refused to define the class of activity "so narrowly as to cover only those activities that do not have a substantial impact on interstate commerce." *Proyect* v. *United States*, 101 F.3d 11, 14 (2d Cir. 1996); *see United States* v. *Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (court's approach in defining class cannot be excessively narrow). Thus, the placement of dredged or fill material in navigable waters (however that term is ultimately construed by the Court) is the appropriate class of activity to be analyzed.[2]

C. The Placement of Dredged or Fill Material Is an Economic Activity

The next question is whether this class of activity constitutes "economic activity" for the purposes of the Court's *Lopez/Morrison* analysis. The placement of dredged or fill material in wetlands is economic activity. In virtually every reported decision involving a section 404 permit, the placement of fill is an integral part of a commercial activity, such as the construction of a residential subdivision, an industrial building, or a public works

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[2] Even if the relevant class of activity were more narrowly defined as the placement of dredged or fill material into isolated wetlands used by migratory birds, the activity still would constitute economic activity and, albeit on a smaller scale, still would substantially affect interstate commerce. *See* pp. 16-18 *infra*.

project similar to the solid waste facility proposed by the petitioner here. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 21 (1985) (placement of fill on 80 acres of wetlands for construction of residential housing development); *United States* v. *Deaton*, 209 F.3d 331 (4th Cir. 2000) (discharge of fill into 5-acre wetlands site for construction of residential housing development); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (proposing to fill 17.6 acres of wetlands for disposal of balefill); *Michigan Peat* v. *United States Environmental Protection Agency*, 175 F.3d 422 (6th Cir. 1999) (proposing discharge into more than 2,000 acres of wetlands for peat mining operations); *Hill* v. *Boy*, 144 F.3d 1446 (11th Cir. 1998) (discharge of dredge and fill material into 33 acres of wetlands as part of construction of earthen dam and 650-acre reservoir); *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) (filling of wetlands as part of planned unit development project serving 80,000 residents); *United States* v. *Brace*, 41 F.3d 117 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (discharge of material into 30-acre site for commercial farming operation); *Hoffman Homes, Inc.* v. *Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993) (filling of 14 acres of wetlands as part as residential subdivision); *United States* v. *Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (dumping of rubble into 14-acre wetland for construction of commercial truck repair garage); *Monongahela Power Company* v. *Marsh*, 809 F.2d 41 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 816 (1987) (discharge of material into 7,000 acres of wetlands during construction of hydroelectric facility); *Friends of the Earth* v. *Hintz*, 800 F.2d 822 (9th Cir. 1986) (approving permit to fill 17-acre wetland site for sawmill logging complex). The types of dredged or fill material

identified in the Corps' regulations also contemplate that the material will be placed in conjunction with economic activity.[3]

In addition, the Court itself has characterized the disposal of solid waste, the type of fill involved here, as a commercial activity. *See Chemical Waste Management* v. *Hunt*, 504 U.S. 334, 340 n.3 (1992) (noting that waste long has been recognized as an "article of commerce"); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-23 (1978) (waste is an article of commerce and subject to the Commerce Clause). It would be paradoxical if landowners did not characterize the placement of fill as an economic activity, because they have frequently argued that the denial of a permit under section 404 constitutes the denial of all economic use of their property. *See, e.g., Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802 (Fed. Cir. 1993); *Cooley* v. *United States*, 46 Fed. Cl. 538 (2000) (awarding over $2 million for taking of property based on denial of section 404 permit).

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[3] The "discharge of fill material" is defined to include the

> "Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs." 33 C.F.R. § 323.2(f).

The petitioner's argument that the placement of fill is noneconomic because a section 404 permit sometimes may be required for a small, private project is unpersuasive. The largest fill projects are invariably commercial or public works projects, *see* pp. 9-10 *supra*, and it can be assumed that small, private projects cumulatively contribute only a small portion of the total fill material for which section 404 permits are sought. Additionally, the placement of dredged or fill material for individual residential projects is likely to be covered by a nationwide permit, and not subject to individualized permit review. *See, e.g.*, 65 Fed. Reg. 12,818 (Mar. 8, 2000). Furthermore, even the placement of dredged or fill material for private non-commercial use fairly may be characterized as an economic activity, because the activity itself costs money to perform and affects the value of the property that is being filled.

D. The Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce

Because it involves the regulation of an economic activity, section 404's regulation of the placement of dredged or fill material in wetlands satisfies the *Lopez* analysis as long as the activity in the aggregate has a substantial effect on interstate commerce, even though it may involve solely intrastate activity and even though in individual instances there may be only a trivial impact on interstate commerce. *Lopez*, 514 U.S. at 558-61; *Morrison*, ___U.S. ___, 120 S.Ct. at 1751; *see Wickard* v. *Filburn*, 317 U.S. 111 (1942).

1. Where Economic Activity Is Involved, Legislation Should Be Sustained Unless There Is No Rational Basis for Congress to Conclude That the Economic Activity in the Aggregate Substantially Affects Interstate Commerce.

Preliminarily, there are significant practical difficulties that a court encounters when evaluating whether the regulation of a particular economic activity substantially affects interstate commerce that it does not confront when evaluating noneconomic activities. In cases such as *Lopez* and *Morrison*, courts are competent to analyze the impact of the noneconomic activity on interstate commerce because they are capable of testing the logic and inferences that purport to connect the noneconomic activity to interstate commerce. In cases involving economic activity, there is an inherent relationship between the activity and interstate commerce, either because the activity involves the expenditure of money, setting off a chain of events in the marketplace, or because the activity causes a physical change to the environment, generating a series of commercial transactions in response to the physical change.

Consequently, where the regulation of economic activity is being challenged, a court is required to make what is primarily a factual, technical assessment of the activity's impact on interstate commerce. In a case such as this, for example, the Court is asked to consider the functions of wetlands, the direct and cumulative physical impacts that the filling of wetlands in one State has on the natural resources in other States, and the interstate economic consequences that result from unregulated fill.

This inquiry implicates a considerable number of technical and economic issues.[4]

The practical problem becomes a philosophical one – is it appropriate for the courts to resolve these highly technical issues in the absence of an evidentiary record, and at what point does this ad hoc, judicial fact gathering lead the courts to substitute their judgment on the need for environmental protection for that of Congress? That wetlands were thought to be worthless swamps less than a century ago is more than just ironic; it says that courts should be hesitant to foreclose Congress' authority to respond to the dangers created by human intervention in the physical environment when the constitutional answer depends on an evolving body of knowledge that the experts themselves do not purport to fully understand. Convenient access to scientific information should not induce the courts to substitute their views on the wisdom of legislation for the fact-finding and representative decisionmaking that is the hallmark of the politically accountable legislative process.

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[4] The list might include matters such as: (1) the methodologies for identifying and quantifying wetlands; (2) the hydrology of isolated wetlands and their relationship to the larger aquatic system; (3) the functions of isolated wetlands; (4) the methodology that should be used to quantify the economic impacts caused by filling of wetlands on water quality, flood control and erosion control, and the assessment of those economic impacts; (5) the aggregated effect that the loss of wetlands has on migratory birds and other wildlife; (6) the economic impact from lost recreation opportunities such as hunting and birdwatching caused by these impacts; and (7) the economic cost of replacing wetlands if they are filled without restrictions.

The Court's recent Commerce Clause decisions have not abandoned this view. *Morrison* reiterated the requirement that the Court would invalidate a statute only upon a "plain showing" that Congress had exceeded its constitutional bounds. *Morrison*, 120 S.Ct. at 1748; *see Lopez*, 514 U.S. at 573-574 (Kennedy, J., concurring). Nor has the Court repudiated its rule that the Court "must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981); *see Riverside Bay View Homes, Inc.*, 474 U.S. at 134 (deferring to EPA's technical expertise that adjacent wetlands are bound up with the waters of the United States); *Perez*, 402 U.S. at 154-55 (deferring to congressional judgment that intrastate extortionate credit transactions affect interstate commerce).

Therefore, absent a demonstration by the petitioner that there was no rational basis for Congress to conclude that the placement of dredged or fill material in the aggregate substantially affects interstate commerce, the legislation should be sustained.

2. There Was a Rational Basis for Congress to Conclude That the Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce

There was a rational basis for concluding that the placement of dredged or fill material in wetlands has a substantial effect on interstate commerce. These impacts are addressed in the other briefs supporting the federal government's position and the following discussion is not exhaustive.

a. Wetlands, including isolated wetlands, represent one of the most important components in preserving environmental quality. Wetlands enhance water quality by cycling nutrients, storing organic material, and filtering some types of pollutants such as heavy metals. Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 43, 48-51 (1984). It has been reported, for example, that the loss of 50% of the country's remaining wetlands could result in expenditures of $75 billion just for increased sewage treatment for the removal of nitrogen. Houck & Rolland, *Environmental Federalism in Wetlands Regulation*, 54 Md.L.Rev. 1242, 1245 (1995). With the country's extensive network of interstate watersheds, pollution in one State can readily affect the water quality in another; pollution in six States has been held responsible for the poor health of Chesapeake Bay. *Id.*

Wetlands also facilitate flood control by detaining flood water and thereby curtailing flow peaks in downstream reaches. *E.g.*, Demissie et al., *Influence of Wetlands on Streamflow in Illinois*, Ill. State Water Survey, 1-2 (1993); Office of Technology Assessment, *supra*, at 43-46. Two case studies in the State of Washington demonstrated that the value of wetlands for flood control ranged from $8,000 to $51,000 per acre. *The Economic Value of Wetlands, Wetlands' Role in Flood Protection in Western Washington*, Wash. Dept. of Ecology, Oct. 1997, at 5. One study by the Corps concluded that the loss of headwaters in the Charles River could lead to annual flood damages of over $17 million, Office of Technology Assessment, *supra*, at 37; another documented the benefits provided by wetlands in reducing flood flows in southern Illinois, *id.* at 44-45. The loss of wetlands contributed to the enormous interstate damage caused by 1993 floods of the upper Mississippi, and wetlands have been identified as an

important resource for controlling flood damage along the Passaic River. N.Y. Times, July 20, 1993, § C (Science Desk), at 1, col. 1. Wetlands also provide enormous economic value with their contribution to the reduction of shoreline erosion. Office of Technology Assessment, *supra*, at 46-47.

The attributes of isolated wetlands – their value for water filtration, flood and erosion control, and species habitat – are similar to those of adjacent wetlands that the Court found appropriate for federal regulation in *Riverside Bayview Homes, Inc.*, 474 U.S. at 134-35. These wetland services, although often difficult to quantify, provide real value to the national economy. The services that ecosystems provide have been estimated worldwide at $33 trillion – 1.8 times more than the global gross national product. Costanza, et al., *The Value of the World's Ecosystem Services and National Capital*, Nature, Vol. 387, May 15, 1997, at 259. The economic services provided by wetlands (such as water supply, nutrient cycling, waste treatment and wildlife) alone has been estimated globally at more than $330 billion annually. *Id.* at 254, 256.

b. Even if one were to narrowly define the class of regulated activity at issue in this case as the filling of isolated wetlands used by migratory birds, the loss of those wetlands would have a substantial impact on interstate commerce. Wetlands provide food, shelter, resting and feeding places on migratory routes, and all migratory birds depend on wetlands for their survival. *E.g.*, U.S. Fish and Wildlife Service, *1994 Update to the North American Waterfowl Management Plan* 20. Destroying bird habitat is simply a slower and more insidious way of destroying the birds themselves. *See, e.g.*, Stewart, *Technical Aspects of Wetlands as Bird Habitat*, U.S.G.S. Water

Supply Paper 2425, at 7, 10. The filling of isolated wetlands is of particular concern because, for many migratory birds, small isolated wetlands provide a unique habitat that is essential to their survival. Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals*, Wetlands, Vol. 13, No. 1, Mar. 1993, at 25. The draining of prairie potholes in North Dakota, for example, has threatened to eliminate a variety of wintering waterfowl of Virginia, Maryland and Delaware. Houck & Rolland, *supra*, 54 Md.L.Rev. at 1248 (citing study).

No speculative inferences are needed to connect the reduction of migratory bird populations to substantial impacts on interstate commerce. Billions of dollars are spent annually on the hunting, recreational observation and study of migratory birds. Studies show, for example, that in 1996 those engaged in the hunting of migratory birds expended more than $2.99 billion, U.S. Fish and Wildlife Service, *The Economic Importance of Hunting* (prepared by Southwick Associates) at 8 (1998); those engaged in observation and photography of wildlife spent more than $9.6 billion in 1991 for related goods and services, U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife Associated Recreation*, at 90-91 (tables 39, 40). *See also Hoffman Homes*, 999 F.2d at 261 ("millions of people spend billions of dollars annually on hunting, trapping, and observing migratory birds"); *1994 Update to the North American Waterfowl Management Plan, supra*, at 4 (more than 30 million people spend billions of dollars annually on recreational activity related to migratory waterfowl); Office of Technology Assessment, *supra*, at 54. Much of this money is spent in rural areas where "sportsmen's dollars often mean the

difference between real jobs or hard-core unemployment." *The Economic Importance of Hunting, supra,* at 5.

To say, as the petitioner does, that the pursuit of hunting and birdwatching is a noncommercial activity is to engage in a form of denial about the enormous role that tourism and recreation plays in the economy of the country. The performance of a recreational activity is the end product of a series of economic transactions between the recreational user and the persons that supply the goods and services. All objects of interstate trade merit Commerce Clause protection, *Philadelphia* v. *New Jersey,* 437 U.S. at 622, including service industries, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 577 n. 10 (1997).[5]

c. The disposal of solid waste, the purpose for which fill was proposed in this case, has a substantial effect on interstate commerce. *See C&A Carbone, Inc.* v. *Town of Clarkstown,* 511 U.S. 383, 390-91 (1994) (referring to the profitable business of waste collection); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources,* 504 U.S. 353, 359 (1992) (commercial transactions involving waste disposal "unquestionably have an interstate character"). Public and private entities involved in waste disposal often seek to deposit waste across state lines; for example, the petitioner here currently sends the waste intended for the proposed balefill facility to Bristol, Wisconsin. Chicago Tribune, Aug. 13, 2000, § 4, at 1. Indeed, an entire branch of dormant Commerce Clause jurisprudence has risen around the

[5] For example, tourism and travel is the third largest employer in California, generating expenditures of over $67 billion statewide. Cal. Travel and Tourism Comm'n, *Fast Facts 2000,* at 2 (2000).

efforts of States to regulate the flow of solid waste across state lines. *E.g., C&A Carbone; see Hughes* v. *Oklahoma,* 441 U.S. 322, 326 n.2 (1996) (definition of commerce is same when relied on to strike down state legislation as it is when relied on to support federal regulation).[6]

d. A determination that Congress is powerless to regulate the filling of our nation's wetlands would call into question the validity of considerable federal environmental legislation. Statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, are not meaningfully distinguishable from the Clean Water Act. They all regulate forms of economic activity that are often, but not always, intrastate in character, and that in the aggregate have an enormous impact on the national economy.[7] The Court's cases have "uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution." *Hodel* v. *Virginia Surface Mining,* 452 U.S. at 282-283 (permitting

[6] The petitioner, correctly, does not contend that its status as a governmental entity changes the Commerce Clause analysis. *See Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 583-84 (1997); *Fort Gratiot Sanitary Landfill, Inc.,* 504 U.S. at 359.

[7] The list of federal statutes protecting the environment and natural resources is extensive. E.g., Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464; Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h; the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-83; the Endangered Species Act, 16 U.S.C. §§ 1531-1544; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671; the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j.

regulation of harmful environmental effects of surface coal mining); *see Riverside Bayview Homes*, 474 U.S. 121 (upholding Corps' regulation of adjacent wetlands under the Clean Water Act as within scope of Commerce Clause). If Congress can order the cleanup of intrastate sites, it is difficult to understand why it should not have a say about the type of material that goes into them in the first place.[8]

Therefore, Congress is authorized to regulate the placement of fill within navigable waters, including isolated wetlands, because the placement of fill is an economic activity that in the aggregate has a substantial effect on interstate commerce.[9]

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[8] Lower court decisions applying *Lopez* or *Morrison* and upholding environmental regulation include *Allied Local and National Regional Manufacturers Caucus* v. *United States Environmental Protection Agency*, 215 F.3d 61 (D.C.Cir. 2000) (rejecting challenge to Clean Air Act architectural coatings rule); *Gibbs* v. *Babbitt*, 214 F.3d 483 (2000) (concluding that Fish and Wildlife Service regulation prohibiting the taking of red wolf on private land is valid exercise of power under Commerce Clause); *National Association of Homebuilders* v. *Babbitt*, 130 F.3d 1041 (D.C.Cir. 1997), *cert. denied*, 524 U.S. 957 (1998) (upholding protection of endangered species that exist within a single state); *Hartsell* v. *United States*, 127 F.3d 343 (1997), *cert. denied*, 523 U.S. 1030 (1998) (upholding congressional authority to regulate pollution discharge into nonnavigable waters); *Olin Corp.*, 107 F.3d 1506 (finding that regulation of onsite waste disposal constitutes an appropriate element of Congress' broader scheme to protect interstate commerce from pollution and upholds constitutionality of CERCLA); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (rejecting challenge to constitutionality of Bald Eagle Protection Act).

[9] The States join in the argument of the federal government that the Corps' assertion of jurisdiction over isolated wetlands and its reliance on the migratory bird rule was procedurally proper and that, as a matter of statutory construction, was within the scope of the Clean Water Act.

II. SECTION 404'S PERMIT REQUIREMENT IS NOT LAND USE CONTROL, BUT ENVIRONMENTAL REGULATION THAT PROTECTS THE STATES FROM THE INTERSTATE IMPACTS OF WETLAND DEGRADATION

A. Section 404 Protects the Individual States From the Consequences of Fill in Other States, and Complements the States' Own Programs

There are numerous reasons why federal wetlands regulation benefits the States and complements their own wetland protection programs.

1. The citizens of one State have a legitimate interest in maintaining healthy wetlands throughout the country. Federal wetlands regulation insures some measure of protection from the effects that the filling of wetlands in one State may have on water quality, flood control and wildlife in another State. Citizens in one State have an additional reason to be concerned about what goes on in other States, because their federal taxes help pay the bill when federal assistance is required through increased public healthcare costs, flood protection, emergency relief and environmental cleanups when wetlands are not allowed to do their job.

The interstate nature of these various impacts was previously addressed. *See* pp. 15-19 *supra*. Wetlands are not static water systems; they are linked to other wetlands and to other aquatic systems and are highly affected by human activity throughout the watershed. Kusler, et al., *Wetlands*, Scientific American 68-70 (Jan. 1994). Numerous water basins and water bodies overlap state lines, and are affected by wetlands degradation

originating in one State. Further examples include the Klamath River basin that California shares with Oregon, *see* McClurg, *The Klamath River Basin: A Microcosm of Water in the West*, Western Water Magazine, May/June 2000, at 11-12; Lake Tahoe, which is shared by California and Nevada, *see Tahoe-Sierra Preservation Council, Inc.*, v. *Tahoe Regional Planning Agency*, 216 F.3d 764, 767-68 (9th Cir. 2000) (describing effect of wetlands disturbance on water quality of Lake); and the Apalachicola-Chattahoochee-Flint (ACF) River system, which stretches across Florida, Georgia and Alabama, *see* the *Apalachicola-Chattahoochee-Flint River Basin Compact*, Pub. L. No. 105-104, 111 Stat. 2219 (1997).

2. The citizens of the individual States particularly benefit from section 404's protection of migratory bird habitat. In Illinois, for example, the hunters of migratory birds spent approximately $293 million in 1996 alone, U.S. Fish and Wildlife Service, *The Economic Importance of Hunting, supra*, at 8, and more than 1.2 million people in Illinois (including over 100,000 non-residents) spent an average of $231 each in the observation, feeding and photographing of waterfowl, Southwick Associates, *The Economic Benefits of Watchable Wildlife Recreation During 1996 in Illinois*, at 4, 8 (1998). The destruction of wetland habitat in one State that is used by the migratory birds of Illinois therefore will have an impact on the citizens of Illinois who engage in these recreational pursuits, as well as those who provide them goods and services. The protection of the habitat of migratory birds – a natural resource that no one State truly possesses – is the ideal subject for federal concern.

3. The petitioner extols the State of Illinois' review of its project, contending that federal intervention is "unnecessary" and "burdensome." Brief for Petitioner at

30. That one of the 50 States may have adequately reviewed a particular project does not answer the larger question whether the regulation of the interstate impacts of wetland fill is within Congress' enumerated powers. To win the necessity argument, the petitioner at a minimum would need to demonstrate that *all* 50 States have adopted and enforced wetland regulatory programs that are comparable to Section 404.

In fact, very few States have adopted comprehensive wetland regulation.[10] Some States, such as Delaware and Georgia, regulate tidal wetlands but are entirely dependent on section 404 for the protection of isolated, inland wetlands. *See* Del. Code Ann., Tit. 7, §§ 6601-6620; Ga. Code Ann., § 12-5-280. Those States with no or limited wetland regulation include Alabama, Arizona, California, Colorado, Georgia, Idaho, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. *See* Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, prepared for the Association of State Wetland Managers (1995), at 5-8; Ill. Dept. of Natural Resources, *Nationwide Survey of State Wetland Regulatory Programs* (Oct. 1997). Indeed, most state wetland regulation occurs pursuant to the State's federally-inspired section 401 water quality certification program, or as coastal regulation assisted by the federal Coastal Zone Management Act. *Id.*

Consequently, there is a compelling need for federal wetland regulation because of the regulatory void that

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[10] Michigan is an example of a State that has adopted a comprehensive wetland program. *See* Mich. Comp. Ann. §§ 281.683-685, 281.701-722, 322.701 et seq.

would exist in its absence. In any event, the petitioner's claim that federal regulation is unnecessary and burdensome involves a matter of congressional policy, not constitutional authority.

4. The citizens of one State should not be placed at a competitive disadvantage because they have chosen to implement environmental standards when other States have not. This Court more than once has sustained federal legislation to prevent interstate competition that would frustrate an important and legitimate federal objective. In *Hodel* v. *Virginia Surface Mining*, 452 U.S. at 281-82, the Court acknowledged that preventing destructive interstate competition is a traditional role for Congress under the Commerce Clause, and deferred to Congress' determination that nationwide standards were necessary to insure that interstate competition in coal mining would not undermine environmental quality. In *United States* v. *Darby*, 312 U.S. 100, 114 (1941), the Court upheld a law prohibiting the interstate shipment of goods that were produced in violation of the Fair Labor Standards Act, preventing employers in one State from gaining a competitive advantage through substandard working conditions. *See Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-58 (1964) (preventing channels of commerce from being used for racial discrimination).

In this case the United States has identified wetland preservation as an important national objective, spending hundreds of millions of dollars on both regulatory and non-regulatory programs (such as the North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-14 and the Water Bank Act, 16 U.S.C. §§ 1301-11). *See generally* Exec. Order No. 11990, 42 Fed. Reg. 26,961 (May 24, 1977), *reprinted as amended in* 42 U.S.C. § 4321. This objective

would be frustrated, to the detriment of the States, unless there is federal wetlands regulation that insures that federal wetland policy is not undercut by inadequate State standards. Although the petitioner disagrees that there is a need to prevent a "race to the bottom," Brief for Petitioner at 29, that objection goes to the wisdom of federal wetland regulation, not to whether Congress has the power to prevent persons from gaining a competitive advantage by pursuing their projects in States with inadequate wetland regulation.

5. Concurrent federal regulation more often than not supports the States' own environmental objectives, and may lessen the financial burdens on the States. For example, where an activity violates both federal and State pollution control laws, the State may choose to defer to federal enforcement, thereby saving the States the burden of duplicative regulation. In other instances, the States may coordinate their environmental studies with the federal government, avoiding duplication and effecting cost savings to the States and permit applicants. *See, e.g.*, Cal. Code Reg., tit. 14, § 15226. The federal government also may provide expertise to State and local governments through the identification and mapping of wetlands. Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 14. Some States simply may choose to find that the federal government's regulation of wetlands is sufficient, and apply the money saved to some other beneficial purpose.

6. The process of government regulation continues to mature, and the relationship between State and federal regulators has become increasingly cooperative. In California, for example, state agencies have joined with federal agencies to establish an Interagency Vernal Pool Initiative. *See California Wetlands Information Systems,*

<*http://ceres.ca.gov/wetlands/geoinfo/vernal—pools*>. State and federal regulators in California have experimented with a single permitting process in which an applicant who wishes to dredge and dispose of fill makes a single, multi-agency application and any environmental study is conducted jointly by the regulatory authorities. *See* San Francisco Bay Conservation and Dev. Comm'n, *1999 Annual Report*, 17. State and federal personnel also cooperate in the enforcement of their respective statutory requirements. *Id.* at p. 12 (describing Environmental Law Enforcement Task Force).

California's experience has been repeated throughout the country. States such as Delaware, Illinois, Oregon, Virginia, Wyoming, New Jersey, Kansas, Alabama and Alaska have adopted joint permitting procedures with the Corps. Kusler, *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 22. Other States such as the New England States, Maryland, New York and Pennsylvania have State Programmatic General Permit Authority, under which the Corps and the States have agreed to divide permit responsibility on particular projects. Kettering, *Praise for General Permits*, National Wetlands Newsletter, Vol. 16, No. 4, July/Aug. 1994, at 8. In Wisconsin, Indiana and Minnesota, the States and the Corps have agreed upon a regional general permit, which tailors general permits to the needs and conditions in a particular State. *See Association of State Wetland Managers*, <*http://www.aswm.org/nationwidepermits*>. Of course, any State may seek to assume section 404 permit authority and displace the Corps, 33 U.S.C. §§ 1344(g); 33 C.F.R. § 323.5, although only Michigan and New Jersey to date have chosen to do so. Kusler, *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 99, 121. If they are to be "laboratories for experimentation," *Lopez*,

514 U.S. at 581 (Kennedy, J., concurring), the States' freedom to innovate should include the opportunity to coordinate the management of their natural resources with the federal government.

B. Section 404's Permit Requirement Is Environmental Regulation, Not a Form of Land Use and Zoning Traditionally Reserved to the States

The petitioner's claim that the migratory bird rule intrudes upon the traditional authority of State and local governments to engage in land use planning – a rationale that would apply to any form of federal wetland regulation – is misplaced. This is a not a case in which a federal regulation has crossed the line dividing "what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

1. Controlling the impacts of pollution and protecting natural resources has long been a matter of joint Federal and State concern. *See, e.g., Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (States' authority in regulating wildlife and natural resources is shared with the Federal Government); *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) (describing national interest in protecting migratory birds); *Andrus* v. *Allard*, 444 U.S. 51, 63 n. 19 (1979) (national commerce power reaches migratory wildlife). There is a long history of federal legislation in the area of pollution control and resource protection, and it is unnecessary to recount it all here. *E.g.*, Lacey Act, 16 U.S.C. § 701; Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-12; *see* p. 19, n. 7 *supra*. Moreover, the Court has acknowledged that federal protection of the environment and natural resources is

the proper subject of federal regulation under the Commerce Clause. *See* pp. 19-20 *supra*. One may fairly debate the wisdom of these measures, but any debate about the legitimacy of a federal presence in environmental protection should have ended a long time ago.

2. Although land use planning and zoning is traditionally a matter of State and local concern, the permit requirement in section 404 does not constitute conventional land use planning or zoning. Section 404 is a form of environmental protection or pollution control, *see* 33 U.S.C. § 1251, and leaves the ultimate determination of land use to State and local authorities.

In *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987) (O'Connor, J.), the Court found the distinction between land use planning and environmental protection critical to its preemption analysis. The Court in *Granite Rock* upheld the authority of a state agency to regulate the impacts of mining on federal public lands because it found that the agency's review was limited to the environmental impacts of mining and did not determine the underlying land use. The Court expressed the distinction this way: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at 587; *see Hodel* v. *Virginia Surface Mining*, 452 U.S. at 275-76.

Section 404 does not dictate the particular use to which a parcel of property may be employed; it regulates the manner in which the proposed use can be accomplished by eliminating or mitigating the environmental impacts of fill. That the Corps rarely denies a section 404

permit provides further corroboration that the Corps is not dictating land uses. Zinn and Copeland, *Wetland Issues*, Congressional Research Service Issue Brief, May 1, 2000 (between 1995 and 1999 the Corps denied only 0.3% of the annual 74,500 permit requests). Even in those rare cases where a permit is denied, landowners still may be able to modify their project and proceed with their intended use of the property, or else pursue their Fifth Amendment remedy. *See* p. 10 *supra*. Section 404 is a classic form of environmental regulation, not land use and zoning.

3. Federal regulation is not always a good thing. Federal regulation sometimes imposes costs or inefficiencies that the States properly resist, or values the interests of some States over those of others. The issue here, though, is power, not policy. Virtually every day there is new information that changes how we view the physical world, and the public continues to discover how their lives are affected by what goes on in the rest of the country. For matters as profound as the preservation of the nation's remaining wetlands, the courts should not prohibit Congress from choosing a federal solution as long as Congress has a rational basis for finding that a particular economic activity in the aggregate has a substantial effect on the commerce of the country. If the federal solution turns out to be too costly, ineffective, or intrusive, the States and their citizens will look to the political process to make the necessary adjustments.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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IN THE

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SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

—v.—

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICI*

The Anti-Defamation League, People for the American Way Foundation, National Gay and Lesbian Task Force, NOW Legal Defense and Education Fund, National Conference for Community and Justice, Human Rights Campaign, National Coalition Against Domestic Violence, National Federation of Filipino American Associations, India Abroad Center for Political Awareness, National Urban League, National Council of Jewish Women, National Women's Law Center, and American Association of University Women submit this brief as *amici curiae* in support of respondents.[1]

Anti-Defamation League

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocacy organization fighting to guarantee equal treatment of all persons. In particular, ADL has filed *amicus* briefs in

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amici* have obtained and lodge herewith the written consents of the parties to the submission of this brief. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection, as well as several cases addressing Commerce Clause issues in connection with civil rights enactments.[2]

People for the American Way Foundation

People For is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in supporting the enactment of civil rights legislation, participating in civil rights litigation, and conducting programs and studies directed at reducing problems of bias and discrimination. People For has frequently submitted *amicus* briefs in this Court in support of civil rights legislation and of court decisions invalidating discriminatory laws and practices.

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Miller v. Johnson*, 515 U.S. 900 (1995); *Romer v. Evans*, 517 U.S. 620 (1995); *United States v. Morrison*, 120 S.Ct.. 1740 (2000); and *Univ. of Alabama v. Garrrett*, No. 99-1240 (pending) (2000).

National Gay and Lesbian Task Force

Founded in 1973, the National Gay and Lesbian Task Force ("NGLTF") works to eliminate prejudice, violence, and injustice against gay, lesbian, bisexual, and transgendered people, at the local, state, and national levels. As part of a broader social justice movement for freedom, justice, and equality, NGLTF seeks to create a world that respects and celebrates the diversity of human expression and identify where all people may fully participate in society.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. NOW Legal Defense engages on many fronts to eliminate gender-motivated violence and to ensure uniform enforcement of civil rights nationwide. NOW Legal Defense chairs the national task force that was instrumental in passing the historic 1994 Violence Against Women Act ("VAWA"), and represented Christy Brzonkala in *United States v. Morrison*, 120 S. Ct. 1740 (2000). In addition, NOW Legal Defense has appeared in numerous other cases seeking to enforce federal civil rights laws[3], and supporting the rights of women who

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[3] *See, e.g., Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Univ. of Alabama v. Garrett*, No. 99-1240 (pending) (2000).

have been the victims of domestic and other gender-motivated violence.[4]

National Conference for Community and Justice

Founded in 1927 as the National Conference for Christians and Jews, the National Conference for Community and Justice ("NCCJ") is a human relations organization dedicated to fighting bias, bigotry, and racism in America. NCCJ promotes understanding and respect among all races, religions, and cultures through advocacy, conflict resolution, and education. It is uniquely positioned to enhance community leadership development programs in its service area with 65 offices in 35 states and the District of Columbia, and has dedicated itself to transforming communities to provide fuller opportunity and to be inclusive and just through institutional change and by empowering leaders.

Human Rights Campaign

The Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 360,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory, and judicial advocacy, media, and grass roots support on a range of initiatives affecting gay, lesbian and bisexual individuals who suffer discrimination on the basis of their sexual orientation, including the Employment Non-Discrimination Act.

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[4] *United States v. Lanier*, 520 U.S. 259 (1997).

National Coalition Against Domestic Violence

Founded in 1978, the National Coalition Against Domestic Violence ("NCADV") is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. NCADV serves as a national information and referral center for the general public, the media, battered women and their children, public and private agencies, and organizations. NCADV maintains a public policy office in Washington, D.C. in order to influence federal legislation that relates to violence against women, including domestic violence, sexual assault, and stalking. NCADV provides information and technical assistance, and promotes the development of innovative model programs which address the special needs of battered women and battered women's programs. NCADV is especially committed to ending misconceptions about violence against women and victim blaming as well as promoting public awareness about the nature of crimes against women.

National Federation of Filipino American Associations

The National Federation of Filipino American Associations ("NaFFAA") was formed in 1997 to promote the interests of Filipinos and Filipino Americans so that they can become active participants and leaders in all aspects of U.S. society. It is NaFFAA's mission to promote community empowerment through civic participation in the U.S. political process. Essential to this mission is advocacy for civil rights, equity, social justice, and equal treatment of all persons. NaFFAA has led the struggle of Filipino World War II Veterans who have been denied their benefits due in large part to institutional racism. NaFFAA has also collaborated with

other national civil rights organizations to fight hate crimes, racial profiling, and anti-Asian violence. NaFFAA is proud to be part of a broader social justice movement for freedom, justice, and equality, and believes deeply that diversity is the foundation of America's strength.

India Abroad Center for Political Awareness

The India Abroad Center for Political Awareness ("IACPA") was founded in 1994 to help increase political awareness in the Asian Indian American community. IACPA is a national, nonpartisan, nonprofit agency dedicated to fighting for hate crimes legislation, for fair treatment for immigrant communities, and for increased participation by Indian Americans in our democracy.

National Urban League

The National Urban League, under the leadership of Hugh B. Price, has sought to emphasize greater reliance on the unique resources and strengths of the African-American community to find solutions to its own problems. The League's approach has been to utilize the tools of advocacy, research, program service, and systems change. The result has been an organization with strong community roots focused on the social and educational development of youth, economic self-sufficiency, and racial inclusion. The League, through its affiliate system, serves more than 2 million individuals each year. The League views with concern any potential abridgement of the scope of the federal Commerce Clause.

National Council of Jewish Women

The National Council of Jewish Women ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve quality of life for women, children, and families, and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members in over 500 communities nationwide. NCJW joins this brief in view of its historical commitment to civil rights and its active involvement in passage of our nation's civil rights laws.

National Women's Law Center

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under federal anti-discrimination laws. NWLC has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

American Association Of University Women

For over a century, the American Association of University Women ("AAUW"), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal

change. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education; reproductive choice; social security; and workplace and civil rights issues. AAUW supports constitutional protection and enforcement of civil rights for all individuals, and opposes all forms of discrimination.

* * *

As leading civil rights organizations, the *amici* have a keen interest in the use by Congress of the Commerce Clause power to enact and enforce civil and human rights protections. *Amici* have consistently supported *federal* jurisdiction over activities, whether they may be characterized primarily as commercial or non-commercial, that are inimical to the fundamental human rights of our people. From the seminal Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, to VAWA (108 Stat. §§ 1902-1942), to the pending federal hate crimes legislation [Local Law Enforcement Enhancement Act of 2000], *amici* have supported national efforts precisely because local efforts have been absent or ineffective, or because a concerted national effort was plainly required to eradicate long-tolerated practices that had persisted over decades despite their illegality.

The case before the Court today does not directly concern a civil rights law. But its resolution — should the Court abandon the "cumulative impact" or "aggregation" principle that historically has been used to evaluate exercises of the Commerce Clause power — may cast serious doubt on the previously well-accepted foundations of some of the central civil rights laws of our time. *Amici* therefore appear in this case to demonstrate that the aggregation principle is a well-founded rule whose application is of great utility in determining

whether Congress has acted consistently with the powers conferred on it by the Constitution — as it has here indisputably done. *Amici* also appear to point out that the civil rights protections supported by the aggregation principle not only are part of our settled expectations as a society, but also have been prime movers in the evolution of the freest nation in the world, whose fundamental social liberties have been in part responsible for its emergence as a dominant world power. The articulation and maintenance of the enumerated powers of Congress, as well as the balance between local and central power, have been well served by the constitutional regime that the Court reexamines in this case. In disregarding that regime, the Court would act at the peril of settled expectations as to our nation's civil and human rights.

STATEMENT

1. This case concerns the failure by petitioner to secure a landfill or balefill permit from the U.S. Army Corps of Engineers in order to comply with the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The Corps claims jurisdiction to require petitioner to secure such a fill permit in order to fill over 17 acres of lakes and ponds that are neither interstate in character nor have a connection to interstate or navigable waters. In so insisting, the Corps relies on the "migratory bird" rule. The rule permits it to exercise jurisdiction over such waters because of their actual or potential use as habitat for migratory birds, and the resulting substantial effects on interstate commerce that destruction of migratory bird habitat might have.

2. The parties concede, and the Seventh Circuit found, "that the waters of [the landfill] site were a habitat for migratory birds." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999). The circuit court further found that "the destruction of migratory bird habitat and the attendant decrease in the population of these birds 'substantially' affects interstate commerce." *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850. The activities of observing, hunting, and trapping migratory birds are a not insubstantial component of the national economy, entailing the expenditure of billions of dollars each year, and travel across state lines.

3. While mindful that the Corps of Engineers' actions prohibiting the filling of ponds that serve as migratory bird habitat could be seen as a purely local regulation, the circuit court was equally clear that proper implementation of the Commerce Clause power requires Congress to consider the "aggregate effect" of individual or local actions in order to assess whether, overall, such actions have a "substantial effect" on interstate commerce. "The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires." *Solid Waste Agency of Northern Cook County*, 191 F.3d at 850.

4. The Court granted *certiorari* to consider two questions. First, whether the Corps of Engineers, consistent with the language and intent of the Clean Water Act, may assert jurisdiction over isolated intrastate waters because they serve as habitat of migratory birds. Second, whether the exercise of such jurisdiction is within the power conferred on Congress by the Commerce Clause. Put differently, the question is whether, by reason of the conceded aggregate substantial effect on the national economy of the destruction of

migratory bird habitat, our central government may invoke its commerce power.[5]

SUMMARY OF ARGUMENT

1. The exercise of federal power at issue here is in all respects consistent with the Commerce Clause and with this Court's settled Commerce Clause jurisprudence. National power extends to activities that, although local in nature, may in the aggregate have a substantial impact on the nation's and our people's economic life. The aggregation principle is a well settled precept that elucidates the circumstances in which the exercise of national legislative power is warranted.

2. The boundaries of the commerce power have been developed and articulated by this Court over almost two centuries of case law and social and economic development. The exercise of that power here must be analyzed within the context of the pragmatic test first articulated by *Gibbons v. Ogden*, and elaborated in the cases that have enunciated the substantial effects test and the aggregation principle in the modern era. When viewed within that setting, this exercise of federal power — as well as that exercise which underlies adoption of numerous civil rights protections — is undoubtedly consistent with the commerce clause.

3. The aggregation principle has served as the cornerstone of the federal power underlying some of this

[5] *Amici* take no position on the first question, as they have no interest, other than a general, undifferentiated one, in the enforcement of our country's environmental laws. As to the second question, however, *amici* have a sharp and specific interest in the use of the cumulative impact or aggregation principle to sustain Congress's civil and human rights enactments.

nation's most important civil rights enactments. In the civil rights context, the cumulative effect or aggregation principle has in this Court's view provided the support for the Civil Rights Act of 1964, and for other laws that protect the access of protected groups to the national economic life, and as such are within the paradigm of federal power.

4. As a long-standing pillar of the commerce power, the aggregation principle is part of the settled expectations of our people and our nation. Likewise, the laws it supports are a part of those settled expectations. The rule of *stare decisis* is an important one. No departure from it is warranted in the circumstances of this case.

ARGUMENT

THE AGGREGATION PRINCIPLE IS A FUNDAMENTAL AND WELL-GROUNDED CONSTITUTIONAL DOCTRINE THAT SHOULD BE RETAINED BY THIS COURT

Drawing upon the touchstone of *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), the cumulative impact principle is essential to the judicial consideration of whether Congress may regulate the web of interstate dealings that constitute and permeate our national economy. The principle is based on the recognition that use of the commerce power reflects the economic interrelatedness of our people and our nation, as well as the federal government's special competence in dealing with problems of national scope. The requirements of federalism are important, as is the teaching that enumerated and divided powers are designed to protect and preserve our peoples' liberties. But when those precepts are used as talismans to undermine a federal power that properly protects our environment, our civil rights, or other areas of federal concern, we risk exalting concept over reality.

A. The Cumulative Impact Test is Firmly Rooted in Our Nation's Economic Life and Well Settled in its Constitutional History.

Article I, § 8 of the United States Constitution gives Congress the authority to "regulate Commerce . . . among the several States." U.S. Constitution Art. I, § 8. In *Gibbons*, Chief Justice Marshall enunciated the view that congressional power over "commercial intercourse" extended to all commercial activity having any interstate component, aspect, or impact, however indirect, and that

Congress's commerce power is "plenary," absolute within the sphere of legislation with respect to all "commerce which concerns more states than one." *Id.* at 194. Under this view, the sole constraint on the commerce power is the democratic process itself. "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, . . . the sole restraints . . . on its abuse." *Id.* at 197.

Notwithstanding the clear mandate of *Gibbons*, the Court retreated from this expansive view and during the period 1887 through 1937 sought to deny Congress the power to deal with uniquely national problems. The Court ignored "the single, national market still emergent in our own era." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). At the same time, the Court engaged in an artificial hermeneutics of the term "commerce" that sought to justify a narrow and confined reading of national power. *E.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (distinguishing between commerce and production). The retreat from Chief Justice Marshall's view culminated in a series of decisions that struck down Congress's efforts to deal with the worst economic depression this nation had ever suffered. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See Lopez*, 514 U.S. at 571-72 (Kennedy, J., concurring).

Following the close of that now-outmoded jurisprudential era, however, the Court resoundingly rejected its former fragmented view of the Commerce Clause power, and reaffirmed the pragmatic rule first enunciated by Chief Justice Marshall in *Gibbons*. Thus, beginning with the landmark decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court began to develop a modern view of the commerce power,

in keeping with a truly national economy. The Court there held that Congress could regulate labor relations at an integrated manufacturing and interstate sales enterprise because labor unrest and work stoppages at such a business "would have a most serious effect upon interstate commerce." *Id.* at 41, 42.

Following *Jones & Laughlin*, the Court developed the pragmatic "substantial effects" test, which focused on the "effect" on interstate commerce of a regulated activity. At the same time, it rejected the ritualistic search for whether an activity was in the current of commerce. In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court approved federal regulation of wages and hours of workers because effectuation of the Commerce Clause power conferred on Congress the power to protect the national economy.

In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court further reaffirmed the plenary scope of Congress's power to regulate activities that substantially affect commerce by enunciating the "aggregation" or "cumulative effect" principle. *Id.* at 129. In that case, the Court held that Congress could regulate a farmer's production of wheat for home consumption, because the cumulative effect of such consumption might alter the supply-and-demand relationships of an interstate market. The Court approved the regulation of a specific intrastate activity that "may be trivial by itself," because the effect on interstate commerce of that activity, "taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

In both *Darby* and *Wickard*, the Court looked not only to the Commerce Clause but also to the Necessary and Proper Clause, as it was explicated by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

The Necessary and Proper Clause augments the Commerce Clause, and gives Congress the broad prerogative to determine the means by which it will effectuate its policy regarding interstate commerce. *Id.* at 420-21.[6]

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Darby, 312 U.S. at 118. The Necessary and Proper Clause permits Congress to regulate in areas not strictly within the enumerated powers of Article I, Section 8 if necessary to carry out an enumerated power. Recognizing the nature and extent of the Necessary and Proper Clause "made the mechanical application of legal formulas no longer feasible." *Wickard*, 317 U.S. at 124.

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[6] Because it is well settled that Congress has the power to protect what is in all senses a national economy, laws that protect entry into and full participation in that economy express the exercise of powers ancillary to an enumerated power. Such laws are "constitutionally valid, so long as the ancillary power neither conflicts with external limitations, such as those of the Bill of Rights and of federalism, nor renders Congress' powers limitless." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-3 at 798 (3d ed. 2000). The federal civil rights laws are consistent with a principled distinction between federal and state power, and do not signal unlimited federal power.

The Court's most recent cases examining Congress's power under the Commerce Clause confirm that Congress may regulate local activities, when necessary to protect the national economy, because of their effects beyond state borders.[7] *See United States v. Morrison*, 120 S.Ct. 1740 (2000) (finding no interstate effect of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (finding no sufficient interstate commerce effect from firearms possession near schools). As stated in *Morrison*, the Court will sustain "a wide variety of congressional Acts regulating intrastate economic activity where [the Court] conclude[s] that the activity substantially affect[s] interstate commerce." *Morrison*, 120 S.Ct. at 1750 (quoting *Lopez*).[8]

Using cumulative impact principle to determine substantial effect is a settled rule of constitutional

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[7] *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (enforcing Federal Arbitration Act in state court suit involving home purchase); *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264 (1981) (local erosion standards in surface mining); *Perez v. United States*, 402 U.S. 146 (1971) (local criminal activity); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (intrastate marketing of milk). The *amicus* briefs filed by the Center for Individual Rights and others simply omit the history of Commerce Clause jurisprudence between *Gibbons* and *Lopez*. That they do so is not surprising, because in light of this history it would be difficult to argue, as they do, that Congress seeks to "bootstrap" or "extend" the commerce power beyond "commercial" activities. To the contrary, as the last half-century of case law demonstrates, it is petitioner and its *amici* that seek to truncate congressional power as currently recognized in this Court's jurisprudence.

[8] *Wickard* retains its constitutional vitality today. Yet precisely because it demonstrates how far the commerce power may constitutionally reach, it also discloses the weakness in an analysis that does not take into account the aggregate effects of individual acts. Growing wheat for home use has *no* effect on interstate commerce, except in the aggregate.

adjudication that should not be rejected or weakened. The Court today would disregard this principle at the peril of upsetting an analytic structure that has served both the Court and the nation well in ascertaining the bounds of congressional power.

B. The Cumulative Impact Test Strongly Enforces the Important Federal Interest in Uniform Civil Rights Protections.

Among the laws that have become so interwoven in the fabric of our national life as to make that life inconceivable (or certainly undesirable) without them are the seminal civil rights laws of the 1960s. The cumulative impact or aggregation principle first enunciated by this Court in *Wickard* provides the constitutional cornerstone of those laws. In the first cases to consider the constitutionality of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the Court upheld a prohibition on racial discrimination at, respectively, a local motel and a local restaurant. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Despite the purely local nature of these businesses, the Court emphasized the aggregate effect that racial discrimination in such activities would have on interstate commerce. The Court pointed to potential inhibition of interstate sale of goods, obstructions to interstate travel, and obstacles to the establishment of new business enterprises, all plainly evils that Congress sought to address in enacting this legislation. *Katzenbach v. McClung*, 379 U.S. 294 (1964).[9]

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[9] That the aggregation principle is critical to the holding of the Court in *Heart of Atlanta* is made abundantly clear by Justice Black's concurrence. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 268-79 (Black, J., concurring).

In responding to the objection, lodged in *Heart of Atlanta*, that the "operation of the motel here is of a purely local character," the Court quoted from *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949): "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Heart of Atlanta*, 379 U.S. at 258. Reaffirming both the substantial effects test and the aggregation principle of *Wickard*, the Court looked to the aggregate impact that local activities might have on national commerce.[10]

In the civil rights arena, the "cumulative impact" or "aggregate effects" principle gives due and proper weight to the effect of discriminatory activities on the national economic life of this country and its peoples, even in such local, non-commercial activities as education, voting, and protection from violence. Discrimination in the classroom, the housing markets, and the work force objectively deters individuals from full participation in the national economy. Less obviously, the experience of being denied access to schools or of being the object of hate-based violence subjectively impedes people's ability to work, to employ others, to invest and to consume. The primary purpose of civil

[10] The Court in *Heart of Atlanta* was equally clear as to the propriety of use of the commerce power even though the conduct forbidden, exclusion of persons from accommodation on the ground of race, could not fairly be characterized as "commercial." Indeed, "discrimination" can be viewed as "commercial" activity only if one examines its *effects* — limiting participation in or wholly excluding the object of discrimination from the national commercial life. "Discrimination" in itself is the archetype of a purely private, local, non-commercial activity — bias or hate directed at another because he or she is different, and the consequent decision not to admit that other to activities or associations generally deemed desirable.

rights protections "is the vindication of human dignity and not mere economics," yet regardless of their purpose Congress has unquestionable authority under the Commerce Clause to enact them because they substantially affect interstate commerce. *Heart of Atlanta*, 379 U.S. at 291-93 (Goldberg, J., concurring).

As used by this Court in *Katzenbach v. McClung* and *Heart of Atlanta*, the cumulative impact principle appropriately secures entry into, and full participation in, the national economy for all Americans. Stated otherwise, the principle serves to protect the economic life of this country for all its citizens, and is thus undoubtedly within the plenary commerce power. In the last analysis, the aggregation precept is nothing more than a refinement of the bedrock principle that this Court reaffirmed once again in *Morrison* and *Lopez*: that Congress has the power to regulate intrastate economic activity when the activity substantially affects interstate commerce. *Morrison*, 120 S.Ct. at 1750.[11]

Amici are not unmindful that the commerce power is limited, and that Congress, however salutary its purpose, may not reach purely local activities with purely local effects. But if this country's recent civil rights laws were to be challenged on the theory, similar to that

[11] Of course, neither the Civil Rights Act of 1964 nor the holdings of *Heart of Atlanta* and *Katzenbach* are before the Court today, and the interstate component of the 1964 Act may protect it from future challenge. However, if the Court repudiates the aggregation principle, civil rights enactments may nonetheless be subject to the same attack as the environmental regulation here. Even to subject them to such constitutional doubt would do violence to settled expectations that are part of the fabric of our American lives. The suggestion that congressional power to enact such laws might be repudiated would send a message of cynicism about human rights at so fundamental a level as to be anathema to a society founded on the rule of law.

before the Court here, that they are designed to attack purely local conduct, the ultimate results of that local conduct must be taken into account. Local, individual acts of discrimination and violence operate to exclude targeted individuals and, ultimately, targeted groups from the national economic life. By forestalling their entry into certain jobs, thwarting their advancement in jobs held, preventing them from owning homes, refusing them capital to operate their own businesses, or denying them the educations employers demand, purely local, non-commercial acts of discrimination, hate, and violence permit the badges and incidents of second class citizenship to continue to exist. The exclusion of classes of our citizenry from such economic participation cannot be seen as anything other than substantial in terms of its effect on the national economy. Preventing this evil is squarely within the paradigm of appropriate federal power.

C. The Case Before the Court Demonstrates Appropriate Circumstances in Which to Apply the Aggregation Principle.

A practical examination of ultimate effects also underscores the conclusion that the Seventh Circuit was correct in this case. Gradual eradication of migratory bird habitat, although its effects may be virtually unobservable in a local, limited territory, ultimately inhibits people from expending monies and traveling across state lines to hunt, trap, and observe migratory species. The aggregate effect of the activity Congress seeks to regulate — the filling of wetlands — plainly would distort the national economy.

Just as decisions like *Carter Coal* attempted to distinguish between "commercial" and "non-commercial" activities, so here petitioner urges that the applicability

of the cumulative impact test should turn on whether the regulated activity is "economic." (Brief for Petitioner at 45) Yet, a rigid "categorical rule" (*see Morrison* at 1748) is neither constitutionally required nor logically defensible in order to aggregate the effects of non-economic activities when the impact of those activities is felt in interstate commerce. To exalt such a rule to a constitutional threshold would thus be error. We suggest instead a more flexible and pragmatic approach; there should be principles that move the debate beyond mere labels.[12] The courts may ask a series of questions to determine whether a given regulation falls within the spheres of legitimate exercise of the commerce power, as augmented by the Necessary and Proper Clause. Some are: Does the subject matter entail special federal competence? Does congressional action address an absence of effective local regulation and enforcement? Is the subject traditionally a matter of national concern? Does the activity regulated have inherent interstate effects?

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[12] It contributes nothing to the debate to parade before the Court a series of "horribles" demonstrating the ostensible danger of governmental tyranny. The "backyard puddle" scenario (depicted by petitioner as well as by the Washington Legal Foundation, the Cato Institute, and the Center for Individual Rights) is calculated to take the commerce power to a point of patent absurdity. There is no basis to believe that Congress intended — or that respondents attempted — to reach so far. One may likewise imagine our country in the absence of laws founded upon the cumulative impact test, including key environmental regulations and civil rights protections. Imagination, however, is not needed, for in the latter case, the Court need only look to the state of American jurisprudence and economic and social life in the late 1920s, when the Court held national child labor laws unconstitutional (*see Hammer v. Dagenhart*, 247 U.S. 251 (1918)), and in the late 1950s, when the National Guard was called out to protect a young child who wished to attend a better public school.

The federal government has developed special competence in a variety of areas in part because of the dual sovereign nature of our national and local governments, in part because the people, through their elected representatives, have reposed power in the national government over two hundred and more years, and in part because Congress has dedicated resources at the federal level to problems of national scope. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). An absence of effective local regulation and enforcement leaves the power to enact such regulations in the hands of Congress under the Commerce Clause. *See, e.g., North American Co. v. SEC*, 327 U.S. 686, 704 (1946) ("The constitutionality of [the statute] thus becomes apparent" when viewed in light of the congressional objective "to rejuvenate local utility management, and to restore effective state regulation, both of which had been seriously impaired.") Similarly, a congressional finding that there is no tradition of effective local regulation is owed judicial deference and justifies Congress in acting to remedy national problems.

Certain areas are a traditional subject of national concern, and in those areas Congress self-evidently retains power to regulate. (As a corollary to this factor, the Court may consider whether congressional exercise of the commerce power will *not* interfere with areas of traditional *state* concern. *See Jones v. United States*, 120 S.Ct. 1904 (2000); *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).)

Similarly, certain activities, regardless of whether they may be said to have a "substantial effect" on national commerce, nonetheless have an inherent interstate effect. The filling of wetlands, even isolated, intrastate ones, has an inherent interstate effect. It reduces the habitat available to migratory wildlife, whose

lives have no reference to state geographic boundaries. In this connection, the Court traditionally, and properly, has shown great deference to legislative findings of impact on interstate commerce. *See Hodel*, 452 U.S. at 276; *Katzenbach, 379 U.S. at 303-4; Heart of Atlanta*, 379 U.S. at 258.

Civil rights protection traditionally is the special province of the federal government, as shown by the history of civil rights enforcement in this country. The underlying policy is embodied in the Fourteenth Amendment, which represents a reaffirmation of the federal, constitutional right of equality and fair treatment. Congress enacted the first Civil Rights Act in 1866, explicitly in response to the states' failure to shield individuals adequately from discrimination. Nearly a century later, Congress again found that the states were failing to enforce the civil rights of racial and other minorities, and enacted the Civil Rights Act of 1964. Such efforts, especially following the 1964 Act, have not been wholly to the exclusion of state and local regulation, yet nevertheless the history of civil rights enactment and enforcement demonstrates that the area has been traditionally entrusted to the national government.

Civil rights is also a matter of special national concern. The commerce power necessarily entails the power to protect every individual from local acts of violence and discrimination that prevent that individual from entering and fully participating in a national economy.

D. Rejecting the Cumulative Impact Doctrine and the Laws It Supports Would Undermine the Settled Expectations of the People of our Nation.

The Court's decisions in *Lopez* and *Morrison* are plainly based on the interpretation of the Commerce Clause in *Wickard* and the seminal civil rights cases discussed above. These cases in turn are based on the aggregation principle. Thus, throughout the 60 years that it has been employed by the Court, the laws that the aggregation principle buttresses have shaped the nation's social evolution. As a result, Americans have come to expect and believe that their national government shields them from hate, bias, and prejudice, whatever its source. To say now that the allocation of power that supports this source of security is jurisdictional error would topple the structure of modern American federalism. Respect for precedent and for the settled expectations of the American people caution against so radical a reversal.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the Court specified four circumstances in which it might be appropriate to upset such a settled line of precedent. None applies here. The first is the "rare" case where a "prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed." *Casey*, 505 U.S. at 854. Neither constitutional scholars nor the Justices of this Court are unanimous in their evaluation of the cumulative impact doctrine. That there are right-thinking lawyers, judges, and scholars who regard the rule as well-founded belies any contention that it is plainly erroneous. A rule of constitutional adjudication that has endured for the last half-century cannot be said to have been "doomed" from adoption.

The second circumstance is where "the rule has proven to be intolerable simply in defying practical workability." *Id.* The cumulative impact test has yielded workable results for many years. It requires a calculus no more complex than any the Court employs in resolving other competing claims. As reinforced by the flexible and pragmatic analysis discussed above, the cumulative impact test furnishes a practical framework for articulating the limits on Congress's commerce power.

The third circumstance is where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Id.* at 855. The result petitioner and its *amici* seek here is not to replace one outmoded rule with another more vital one, but to eliminate a key avenue through which Congress may properly exercise the commerce power. No new doctrine has emerged since *Wickard*. Indeed, recent decisions indicate that the cumulative impact doctrine retains its vitality — it is far from having been "abandoned." *See, e.g., Allied-Bruce Terminix*, 513 U.S. 265.

The fourth circumstance is where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* The integrated national economy that prompted the adoption of the aggregation principle has only broadened and deepened. Now, no less than in the time of *Wickard*, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). Clearly, and equally, civil rights protections are no less vital now and have no less economic effect than they were and had in the time of *Heart of Atlanta* and *Katzenbach*. The horrific events in Jasper, Texas

and Laramie, Wyoming, while they are egregious and certainly unrepresentative, serve to confirm this.

Casey also established the principle that the Court will give additional weight to a constitutional rule if it "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854. Overruling or further limiting the cumulative impact doctrine would generate a reexamination of the United States Code so profound and so far-reaching that it would occupy the better part of the *next* half-century. If the federal government's power to protect civil rights was called into question, millions of Americans would be left without recourse in the face of discrimination. No form of constitutional government could tolerate this type of dislocation.

* * *

As we have sought to make clear, *amici* are gravely concerned that the cramped and confined reading of the Commerce Clause power that petitioner and *its amici* urge here would be applied in future cases to endanger civil rights laws that have become a part of the settled expectations and fabric of our society. The federal civil rights laws were enacted against a background of decades of societal failure (principally, but not only, regionally and locally) to implement fundamental freedoms of the United States Constitution. In addition, Congress understood the economic impact of discrimination. It is no exaggeration to say that the guarantee of equality embodied in those laws, together with the enforcement mechanisms created by them and the federal commitment to support them, have been in part responsible for the United States' emergence as the world's dominant economic power. The ability of the

American people as a whole to protect the weakest among them preserves the very essence of our liberties. To strip our nation of that capability, and return to a long-discredited view both of the Constitution and the national government, would be the height of folly.

* * *

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF DR. GENE LIKENS, DR. JOY ZEDLER, DR. BILL MITSCH, DR. REBECCA SHARITZ, DR. JOSEPH LARSON, DR. LEIGH FREDRICKSON, DR. MARK BRINSON, DR. ORIE LOUCKS, DR. STUART PIMM, DR. RAYMOND SEMLITSCH DR. CURTIS BOHLEN, DR. CHRISTOPHER WOLTEMADE, DR MICHAEL HIRSCHFELD, DR. JOHN CALLAWAY, DR. TERRY HUFFMAN, DR. TOM BANCROFT, DR. KLAUS RICHTER, DR. JOHN TEAL, AND THE ASSOCIATION OF STATE WETLAND MANAGERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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OTHER AUTHORITIES

Bodie, R. & R.D. Semlitsch. *Spatial and Temporal Use of Floodplain Habitats by Lentic and Lotic Species of Aquatic Turtles*, 122 Oecologia 138-146 (2000) 21

Bolen, E.G., *Playa Wetlands of the U.S. Southern High Plains: Their Values and Challenges for Management*, in B. Gopal (ed), Wetlands Ecology and Management (1982) 16

Bolen, E.G., L.M. Smith & H.L. Schramm, Jr., *Prairie Wetlands of the Southern High Plains*, 39 BioScience 615-23 25

TABLE OF AUTHORITIES — Continued

Page(s)

Brun, L.J., J.L. Richardson, J.W. Enz & J.K. Larsen, *Stream Flow Changes in the Southern Red River Valley* 38 N.D. Farm Res. 1-14 (1981) 10

Burton, T.M. & G.E. Likens, *Energy Flow and Nutrient Cycling in Salamander Populations in the Hubbard Brook Experimental Forest, New Hampshire*, 56 Ecology 1068-1080 (1975) 20

Burton, T.M., & G.E. Likens. *Salamander Populations and Biomass in the Hubbard Brook Experimental Forest, New Hampshire*, Copeia 541-546 (1975) 19

Campbell, K.L. & H.P. Johnson, *Hydrologic Simulation of Watersheds with Artificial Drainage*, 11 Water Resources 120-26 (1975) 10

Carter, V., *Technical Aspects of Wetlands; Wetland Hydrology, Water Quality and Associated Functions*, in J.D. Fretwell, J.S. Williams & P.J. Redman (eds.), National Water Summary on Wetland Resources, U.S. Geological Survey Water-Supply Paper 2425 (1996) 8, 25

Conant, Roger & Joseph T. Collins, A Field Guide to Reptiles and Amphibians: Eastern and Central North America (1991) 20

Council on Environmental Quality, Environmental Trends (1989) ..... *passim*

Crissey, W.F., *Prairie Potholes from a Continental Viewpoint*, in Saskatoon Wetlands Seminar, Candian Wildlife Service Report Series 6, at 161-71 (1969) 18

TABLE OF AUTHORITIES — Continued

Page(s)

Dahl, Thomas E., Status of Prairie Pothole Wetlands in the United States (U.S. Fish & Wildlife Service 1990) 17

Ehrlich, Paul, David S. Dobkin & Darryl Wheye, The Birder's Handbook: A Field Guide to the Natural History of North American Birds 42 (1988) 19, 27

Elias, S.P., J.D. Fraser & P.A. Buckley, Piping Plover Foraging Ecology in New York Barrier Islands, 64 J. Wildlife Management 346-54 (2000) 19

Farrar, Jon, Nebraska Game & Parks Commission, Nebraska's Rainwater Basin (1996) 17

Gambrell, R.P., *Trace and Toxic Metals in Wetlands, A Review*, 23 J. Env'l Qual. 883-91 (1994) 13

Gibbs, J.P., *Wetland Loss and Biodiversity Conservation*, 14 Conservation Biology 314-317 (2000) 21

Graham, T.E., *Habitat Use and Population Parameters of the Spotted Turtle, Clemmys guttata, a Species of Special Concern in Massachusetts*. 1 Chelonian Conservation Biology 207-214 (1995) 22

Hubbard, Daniel E., Glaciated Prairie Wetland Functions and Values: A Synthesis of Literature, U.S. Fish and Wildlife Service Biological Rep. 88(43) (1988) 10, 12, 24, 25

TABLE OF AUTHORITIES — Continued

Page(s)

Huffman, Wayne, G. Thomas Bancroft & Richard J. Sawicki, *Relationships Among Wading Bird Foraging Patterns, Colony Locations, and Hydrology in the Everglades*, in Steve Davis & John Ogden, Everglades: The Ecosystem and its Restoration 585-614 (1994) 27

Interagency Floodplain Management Review Committee, Sharing the Challenge: Floodplain Management Into the 21st Century (1994) 9

Kantrud, H.A., G.L. Krapu & G.A. Swanson, Prairie Basin Wetlands of the Dakotas: A Community Profile, U.S. Fish & Wildlife Service Biological Report 85 (1989) 17

Korschagen, C.E., L.S. George & W.L. Green, *Feeding Ecology of Canvasbacks Staging on Pool 7 of the Upper Mississippi River*, in Waterfowl in Winter, Milton W. Weller (ed.) 18

Krapu, G.L., G.C. Iverson, K.J. Reinecke & C.M. Boise, *Fat Deposition and Arctic-Nesting Sandhill Cranes*, 102 Auk. 362-68 19

Krapu, G.L., H.J. Reinecke, D.G. Jorde, & S.G. Simpson, *Spring Staging Ecology of Midcontinent Greater White-fronted Geese*, 59 J. Wildlife Management 736-746 (1995) 17

Krapu, G.L., P.J. Pietz, D.A. Brandt, R.R. Cox, Jr., *Factors Affecting Mallard Brood Survival in Prairie Pothole Landscapes*, 64 J. Wildlife Management 553-61 (2000) 18

Lamoureux, V.S. & D. M. Madison, *Overwintering Habitats of Radio-implanted Green Frogs*, Rana clamitans, 33 J. of Herpetology 430-435 (1999) 21

TABLE OF AUTHORITIES — Continued

Page(s)

Laney, R.W., *The Elimination of Isolated and Limited-Flow Wetlands in North Carolina,* Proceedings of the Symposium on Coastal Water Resources, American Water Resources Association (1988) 12

Loucks, O.L., *Restoration of the Pulse Control Function of Wetlands and Its Relationship to Water Quality Objectives*, in Jon A. Kulser & Mary E. Kentula (eds), Wetland Creation and Restoration: The Status of the Science (1990).. *passim*

Ludden, A.P., D.L. Frink & D.H. Johnson, *Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota*, 38 J. Soil & Water Cons. 45-48 (1983) 9

Matthews, K.R. & K.L. Pope, *A Telemetric Study of the Movement Patterns and Habitat Use of Rana muscosa, the Mountain Yellow-legged Frog, in a High-elevation Basin in Kings Canyon National Park, California*, 33 J. of Herpetology 615-624 (1999) 22

Moll, D., *Population Sizes and Foraging Ecology in a Tropical Freshwater Stream Turtle Community*, 24 J. of Herpetology 48-53 (1990) 22

Moore, I.D. & C.L. Larson, *Effects of Drainage Projects on Surface Runoff from Small Depressional Watersheds in the North-Central Region*, Water Res. Cent. Bull. 99 (1979) 10

National Research Council of the National Academy of Sciences, *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy* 89 (1992) 25

TABLE OF AUTHORITIES — Continued

Page(s)

National Research Council of the National Academy of Sciences, *Wetlands Characteristics and Boundaries* 156 (1995) 16

Neely, R.K., James L. Baker, J.R. Jones, V.P. Borofka & R.W. Bachman, *Factors Affecting Nutrient Loads in Some Iowa Streams*, 10 Water Research 117-121 (1976) 12

Office of Technology Assessment, *U.S. Congress, Wetlands: Their Use and Regulation* (1984) 13

Phillips, P.J., Judith M. Denver, Robert J. Shedlock & Pixie A. Hamilton, *Effect of Forested Wetlands on Nitrate Concentrations in Ground Water and Surface Water on the Delmarva Peninsula*, 13 Wetlands 75-83 (1993) 12

Reinecke, K.J., R.C. Barkley & C.K. Baxter, *Potential Effects of Changing Water Conditions on Mallards Wintering in the Mississippi Alluvial Valley*, in Milton Weller (ed.), Waterfowl in Winter 325-37 (1988) 18

Ripley, D., *An Overview of North Dakota's Water Resources*, in North Dakota Water Quality Symposium (North Dakota State Extension Service March 20-21, 1990) 24

Semlitsch, R.D., *Allotopic Distribution of Two Salamanders: Effects of Fish Predation and Competitive Interactions*, Copeia 290-298 (1988) 20

Semlitsch, R.D. & J. R. Bodie, *Are Small, Isolated Wetlands Expendable?*, 12 Conservation Biology 1129-1133 (1998) 20, 21

TABLE OF AUTHORITIES — Continued

Page(s)

Skaggs, R.W., J.W. Gilliam, T.J. Sheets & J.S. Barnes, *Effects of Agricultural Land Development on Drainage Waters in the North Carolina Tidewater Region,* Water Resources Research Institute Report No. 159 (1980) 10

Skelly, D.K., E.E. Werner & S.A. Cortwright, *Long-term Distributional Dynamics of a Michigan Amphibian Assemblage*, 80 Ecology 2326-2337 (1999) 20

Skelly, D.K., *Pond Drying, Predators, and the Distribution of Pseudacris Tadpoles*, Copeia 599-605 (1996) 20

State of Illinois, Integrated Management Plan for the Illinois River Watershed (1997) 11

Stewart, R.E. & H.A. Kantrud, *Ecological Distribution of Breeding Waterfowl Populations in North Dakota*, 37 J. Wildlife Management. 39-50 (1973) 18

Tacha, T.C., S.A. Nesbitt & P.A. *Vohs, Sandhill Crane,* in Migratory Shore and Upland Game Bird Management in North America 77-94 (1994) 19

Taylor, Ryan, Illinois Department of Natural Resources Memorandum to Marvin Hubbell, Illinois Department of Natural Resources Regarding "Isolated Wetlands Analysis," (Sept. 18, 2000) 24

Whitfield, J. Gibbons & Raymond D. Semlitsch, Guide to Amphibians and Reptiles of the Savannah River Site (1991) 20

Winter, T.C., *Hydrologic Studies of Wetlands in the Northern Prairie*, in Arnold Van der Valk (ed.), Northern Prairie Wetlands (1989) 10

TABLE OF AUTHORITIES — Continued

Page(s)

Winter, Thomas, Judson Harvery, O. Lehn Franke & William Alley, Ground Water and Surface Water: A Single Resource, U.S. Geological Survey Circular 1139 (1999) 7, 8, 14

Wolman, M.G.& J.F. Miller, *Magnitude and Frequency of Forces in Geomorphic Processes*, 68 J. of Geology 54-74 (1960) 11

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, we file this brief with the consent of the parties as amici curiae in support of Respondent, the United States.[1]

Amici are distinguished scientists with broad expertise in America's aquatic ecosystems. Amici also include the Association of State Wetland Managers, this country's professional society of state and local government scientists and scientists in the private sector involved with the protection, study, or mitigation of wetlands. Scientists authoring this brief include members of the National Academy of Sciences or its science review boards, leading authors on wetlands, hydrology, migratory birds, amphibians, and conservation biology. Amici include many scientists who have served on panels of the National Academy of Sciences established to advise Congress or federal agencies on issues related to wetlands. An appendix with a brief biography of each scientist is attached.

SUMMARY OF ARGUMENT

The essential issue in this case is whether the Clean Water Act and Commerce Clause permit regulation of discharges into "isolated" water bodies. Petitioner argues that isolated waters lack the important functions of adjacent wetlands that justified their inclusion as "waters of the United States" in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Science indicates that

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici curiae or their counsel, made a monetary contribution to the preparation or submission of the brief. The Director of the Association of State Wetland Managers, however, shared a draft of the brief with an attorney for the Environmental Protection Agency, who provided some suggestions on language that probably influenced a few sentences of the brief.

Petitioner's assertion is incorrect. Isolated waters perform precisely the same water quality, flood protection, and other hydrologic and biological functions highlighted by this Court in that case. Indeed, even if Petitioner is correct that "waters of the United States" can only encompass waters that are "closely related" to traditional navigable waters, isolated waters have the same close relationship as the adjacent wetlands at issue in *Riverside Bayview Homes*.

So-called isolated ponds and wetlands (often isolated only as a matter of degree) provide a basic function that wetlands adjacent to navigable waters and their tributaries provide – they store water. If they are left unaltered, the water they store is used by plants, evaporates, or filters through them and often reaches streams and rivers through groundwater. But when isolated ponds and wetlands are developed and drained, the water and its associated pollutants are typically transported quickly and without filtration into the local streams which feed into larger, ultimately navigable, downstream rivers, lakes, and coastal waters.

The results can be severe. Streams receive rapid influxes of water and associated pollutants they had not previously experienced. This may cause flooding, severe bank erosion, and downstream water quality problems. Furthermore, the untrapped water that now flows rapidly as runoff into streams during the spring rainy season is no longer available to recharge groundwater and provide the critical "base" flow to streams in drier summer months.

Indeed, isolated water bodies are often connected to streams and rivers precisely in the same way as the groundwater-fed wetlands at issue in *Riverside Bayview Homes* – through groundwater. The difference is the relative proximity of the wetlands at issue in *Riverside*

Bayview Homes, a difference that does not speak to the basic functions described by this Court in that case.

Petitioners also dismiss the "biological" relationships between isolated ponds and wetlands and navigable waters as an alleged secondary consideration in *Riverside Bayview Homes* that should not be allowed to usurp land use functions through the unjustified regulation of "minuscule" areas in people's backyards.

In fact, the inclusion of "isolated water bodies" does not dramatically alter the reach of the Clean Water Act beyond areas Petitioner finds acceptable. Isolated wetlands probably occupy less than 20% of all wetland acres. Despite this limited extent, isolated waters are critical to the "biological" integrity of aquatic ecosystems because they play a distinct role in the life cycle of many aquatic species, including those which travel across state boundaries and which use navigable waters at other life stages. Most ducks in the United States breed in isolated wetlands and ponds, as do perhaps half of all amphibians, but they also use navigable rivers and coastal waters in non-breeding seasons. Migrating wading birds, like the great blue herons in this case, also rely heavily on isolated ponds and wetlands for breeding or other critical life stages. Unless isolated water bodies are preserved, the ecosystems of major rivers, lakes and coastal waters cannot be preserved as we know them.

This case illustrates these critical linkages. The ponds and wetlands provide an important breeding area for great blue herons, which also use major rivers. The record further reveals many potential hydrologic effects from the development of the ponds. One reason the Army Corps of Engineers denied the permit was that Petitioner failed to demonstrate properly what it would do to dispose of the water after development – water that would otherwise reside in the ponds at depths up to thirteen feet. The Army Corps'

final permit decision does not discuss all the downstream potential consequences of this problem. But given the location of the ponds less than two miles from the Fox River, it seems likely that filling these ponds without proper precautions could result in some of the water and associated pollutants finding their way to the Fox River and from it down the Illinois and Mississippi Rivers. The Corps of Engineers also denied the permit because it found that the proposed landfill would pose an unacceptable risk of contamination to a critical drinking water aquifer.

ARGUMENT

All parties in this case agree that the Clean Water Act and the Commerce Clause appropriately authorize protection as "waters of the United States" of any stream, wetland, or pond that flows directly or indirectly into traditionally navigable waters. Petitioner, the Solid Waste Agency of Northern Cook County ("SWANCC"), agrees that this statutory conclusion follows from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). It held that "adjacent wetlands" are appropriately defined as waters of the United States because of their hydrologic and biological importance to other water bodies. Although Petitioner focuses much of its argument on the Act's use of the term "navigable waters," it concedes that any water body that ultimately flows into a navigable water can be protected regardless of the significance for navigation itself because the water quality goals of the Clean Water Act make it reasonable to address pollution at its source.

Petitioner also accepts the view that any tributary water body and adjacent wetland can be legitimately regulated under the Commerce Clause. Although this water quality relationship may have no effect on navigation, Petitioner claims that interpreting the Clean Water Act with this limitation is sufficient to avoid a serious constitutional

question. Brief for the Petitioner at 26-28. Petitioner never explains the source of this Commerce Clause authority, but Petitioner presumably supports this Court's prior decision that the Commerce Clause permits Congress to regulate activities that have environmental effects in more than one state. *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 282 (1981) ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of air or water pollution, or other environmental hazards that may have effects in more than one State.").

Both Petitioner's statutory and constitutional argument in this case therefore rely heavily on a factual premise: that isolated water bodies lack hydrologic significance for downstream, navigable water bodies. As explained in this brief, this premise is not valid, even as a matter of degree because isolated water bodies store water, and keep it and its associated pollutants from flowing downstream.

Petitioner also downplays the biological role of isolated water bodies as a secondary concern of the Clean Water Act. It also claims that regulation of isolated water bodies leads to unacceptable intrusions on local land use authority in conflict with the limitations of the Commerce Clause. This argument too has a major empirical dimension, for in weighing the practical implications of a potential ruling, this Court will presumably want to weigh the importance of isolated water bodies to the biological goals of the Clean Water Act against the degree to which their protection expands the reach of that Act. But this case is not about the miniscule spot in the backyard (although wetlands can be in backyards). Isolated water bodies can be hundreds of acres and relatively deep and can provide most of the aquatic habitat in a few regions. Their biological value is closely related even to navigable waters because they

provide distinctly kinds of habitats critical for water birds and other aquatic animals at certain seasons or life stages even though these animals use truly navigable waters at other times.

A. Hydrologic Functions of Isolated Water Bodies

In *United States v. Riverside Bayview Homes, Inc.*, this Court considered whether it was permissible for the Corps of Engineers to regulate wetlands adjacent to a lake in Michigan when the wetlands' only connection to the lake was through groundwater. This Court noted "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems," 474 U.S. at 133, and "the inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. In such a context, this Court held the regulation of such wetlands was justified because of "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands."

Hydrologic functions provided one part of this relationship. This Court noted:

> For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams thus preventing flooding and erosion.

474 U.S. at 134. This precise statement is equally true of "isolated" ponds and lakes.

The term "isolated" wetland or pond is not a precise, scientific (or even regulatory) term. In general, the term is used loosely to define wetlands or ponds that lack a surface outlet to downstream rivers and bays. Such wetlands and

ponds typically form in depressions in the landscape and are "isolated" because the higher elevation of the land around them keeps water from flowing further downhill and downstream through even small rivulets. Like wetlands generally, their hydrology is complex and varied, but also like all other water bodies, they have two potential sources of water. First, they typically receive the rainfall or snow melt that runs off a local watershed. This watershed can include millions of acres, as in the case of the Great Salt Lake, which is also an isolated water body, or only a few acres, in the case of small wetlands. Second, they may be fed by groundwater. In many cases, groundwater itself moves downhill across the landscape at various depths below ground but intersects the surface where the surface dips and forms a low depression. Often this groundwater flows through the wetland or pond and then continues underground toward a stream.[2]

As this statement implies, this Court should recognize that "isolated" is generally a matter of degree and for this reason there is no accepted scientific definition of "isolated" ponds or wetland.[3] Many ponds and wetlands overflow into small streams during extremely wet periods. And like the precise groundwater-fed wetlands at issue in *Riverside Bayview Homes*, many otherwise "isolated" wetlands and

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[2] For a discussion of the hydrologic conditions that form wetlands and their interactions with groundwater, see Thomas Winter, Judson Harvey, O. Lehn Franke & William Alley, Ground Water and Surface Water: A Single Resource, U.S. Geological Survey Circular 1139, at 19-21, 46-47 (1999).

[3] Because wetland scientists do not usually use the term "isolated wetlands," the scientific literature cited in this brief regarding isolated wetlands usually refers to depressional wetlands or discusses specific wetland systems, such as prairie potholes, pocosins, playa lakes or Delmarva Bays, that are the typical examples of isolated wetlands.

ponds also have important, and sometimes quite direct, groundwater connections to streams, rivers or bays. *Id.*

Regardless, it is not only the degree to which so-called "isolated" wetlands and ponds are in fact connected to streams that determines their hydrologic functions; it is just as much their degree of isolation. *The basic function served by "isolated" ponds and wetlands is simply that they store water at least temporarily, often filter it through their plans and soils, and keep it from flowing further downhill and downstream over the surface.*[4] Conversely, in the typical case, the discharge of dredge or fill material in isolated wetlands and ponds displaces at least some of this storage and typically requires draining this water away and redirecting it into local streams and from there further downstream.[5] This prolonged storage of water is the same

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[4] Winter, *et al.*, *supra* note 2, at 46 ("[M]any areas of glacial and dune terrain do not contribute runoff to an integrated surface drainage network. Instead, surface runoff from precipitation falling on the landscape accumulates in depressions, commonly resulting in the presence of lakes and wetlands."). V. Carter, *Technical Aspects of Wetlands: Wetland Hydrology, Water Quality and Associated Functions*, in J.D. Fretwell, J.S. Williams, P.J. Redman (eds), National Water Summary on Wetland Resources, U.S. Geological Survey Water-Supply Paper 2425 (1996) ("In drainage basins with flat terrain that contains many depressions (for example, the prairie potholes and playa lake regions), lakes and wetlands store large volumes of snowmelt and (or) runoff. These wetlands have no natural outlets, and therefore this water is retained and does not contribute to local or regional flooding.")

[5] "The withdrawal of shallow basin wetlands [in the central regions of the U.S.] through ditching and drainage has greatly increased the rate at which water is discharged from the upland landscape into the remaining wetlands, streams and floodplains. . . . The presence of the drainage channel system increases the flood peak and greatly increases the potential for transport of substances into the aquatic environment." O.L. Loucks, *Restoration of the Pulse Control Function of Wetlands and Its Relationship to Water Quality Objectives*, in Jon A. Kusler & Mary E. Kentula (eds), Wetland Creation and Restoration: The Status

fundamental characteristic that gives adjacent wetlands their hydrologic functions and explains why isolated ponds and wetlands are also important to the functions of flood control, water quality filtration, and streambank erosion highlighted in *Riverside Bayview Homes*.

For example, most of North and South Dakota and much of Iowa and Minnesota form the prairie pothole region of rolling hills and depressional basins. Rain and melting snow flows from the hills into the basins, where it is trapped, and therefore kept from flowing downstream. For example, the Devils Lake basin of North Dakota is already a highly floodprone area, but one study of the basin found that potholes store about 72% of the total runoff in the largest storm that occurred every two years and about 41% of the storm expected to occur once every 100 years.[6] Similarly, an analysis for a federal interagency task force, formed in response to the midwest floods of 1993, found that the most effective area for restoring wetlands to reduce flood damages downstream would be in watersheds with prairie potholes because of their closed nature.[7]

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of the Science 56 (1990). The discharge of dredge or fill material in isolated wetlands or ponds typically occurs during the construction of drainage ditches, and in any event, typically occurs for agricultural purposes, or for developing houses, highways, or facilities like landfills, where the economic use requires associated drainage. Filling wetlands also has the effect of displacing all or at least some of the storage capacity of a wetland, typically forcing the water to go somewhere else (usually through the associated drainage devices).

[6] A.P. Ludden, D.L. Frink & D.H. Johnson, *Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota*, 38 J. Soil & Water Cons. 45-48 (1983).

[7] Interagency Floodplain Management Review Committee, Sharing the Challenge: Floodplain Management Into the 21st Century 46-47 (1994).

Today roughly two-thirds of the original 15 to 17 million acres of prairie potholes have been developed, primarily for agriculture, and the water is now drained in elaborate systems of tile drains and drainage ditches into flowing streams.[8] Several studies conclude that this development contributes to flooding and flood damages along the Red River of North Dakota and in sections of Minnesota and Iowa.[9] Studies in other kinds of landscapes have also shown that drainage of such isolated wetlands increases peak flows downstream.[10]

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[8] Council on Environmental Quality, Environmental Trends 102 (1989).

[9] L.J. Brun, J.L. Richardson, J.W. Enz & J.K. Larsen, *Stream Flow Changes in the Southern Red River Valley*, 38 *N.D. Farm Res.* 1-14 (1981) (increased stream flows in the southern Red River were significantly correlated with increase in drainage in each subbasin); K.L. Campbell & H.P. Johnson, *Hydrologic Simulation of Watersheds with Artificial Drainage*, 11 Water Resources 120-26 (1975) (finding that complete drainage of isolated depressions in Iowa would result in greatly increased flood peak flows); I.D. Moore & C.L. Larson, *Effects of Drainage Projects on Surface Runoff from Small Depressional Watersheds in the North-Central Region*, Water Res. Cent. Bull. 99 (1979) (drainage of isolated wetlands resulted in increased storm volumes and peak discharges from average annual flows). These and other studies are discussed in T.C. Winter, *Hydrologic Studies of Wetlands in the Northern Prairie*, in Arnold Van der Valk (ed.), Northern Prairie Wetlands (1989). A similar summary with a few additional studies is included in Daniel E. Hubbard, Glaciated Prairie Wetland Functions and Values: A Synthesis of the Literature, U.S. Fish & Wildlife Service Biological Rep. 88(43), at 14-16 (1988).

[10] *See* R.W. Skaggs, J.W. Gilliam, T.J. Sheets & J.S. Barnes, Effect of Agricultural Land Development on Drainage Waters in the North Carolina Tidewater Region, Water Resources Research Institute Report No. 159 (1980) (showing three to four times increased peak runoff rates in agriculturally developed versus undeveloped wetland soils in Eastern North Carolina). (Although this study does not use the term "isolated wetlands," the areas discussed in North Carolina are often considered isolated; *see* Council on Environmental Quality, *supra* note 8, at 103.) *See also* Loucks, *supra* note 5, at 56 (summarizing studies of a watershed around Madison, Wisconsin, showing drainage of depressional wetlands, along with other wetlands, contributed to increased peak flows).

By contributing to larger flows downstream, the drainage of isolated ponds and wetlands also contributes to the erosion of streambanks by increasing the frequency of high flows.[11] Streambank erosion is a major problem in agricultural regions of the Upper Midwest, and contributes significantly to sediment water quality problems in downstream rivers, including navigable water bodies.[12]

The development of isolated ponds and wetlands also has other water quality impacts. The reason is that the pollutants that were filtered by or stored in the wetland are moved directly into neighboring streams and eventually the rivers and bays they feed.

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[11] The relationship between more rapid drainage and flow and streambank erosion, acknowledged by this Court in Riverside Bayview Homes, 474 U.S. at 134, has long been known to scientists. M.G. Wolman & J.F. Miller, *Magnitude and Frequency of Forces in Geomorphic Processes*, 68 J. of Geology 54-74 (1960), discusses that it is bankfull flows that typically occur on average once every year or two that have the greatest effect, and these are the kinds of increased flows some studies have associated with drainage of isolated wetlands, *see supra* note 9.

[12] The State of Illinois's action plan for the Illinois River focuses significantly on streambank erosion caused by increased flows from alteration of the landscape (which includes the drainage of isolated wetlands). The State of Illinois's Integrated Management Plan for the Illinois River Watershed (1997) describes how sedimentation, caused in part by streambank erosion, is filling up backwater lakes on the Illinois River and creating problems for navigation. Discussing how "swiftly moving waters" due to alterations of the landscape, are "carving away at streambanks," the plan includes seven features to slow down the flow of water to reduce stream erosion.

Because there is no inherent reason to distinguish the water quality effects of isolated wetlands from those of other kinds of wetlands, few studies attempt to do so. But studies that directly measure the transformation of pollutants in the occasional overflow from isolated wetlands types, or studies of watersheds with a high proportion of isolated wetlands, support the view that their water quality functions are significant. For example, studies have shown that prairie potholes significantly reduce concentrations of pollutants in agricultural runoff, and conversely, a study in the prairie pothole region of northwestern Iowa has shown that pollution concentrations increase as wetland acreage is decreased by drainage.[13] The U.S. Geological Survey has also shown that on the Delmarva Peninsula (the eastern shore of the Chesapeake Bay), the concentrations of nitrate, a major pollutant of concern, decrease in correlation with the presence of forested wetlands, many of which are in isolated "closed depressions."[14] Other studies have reached similar conclusions.[15]

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[13] *See e.g.*, Hubbard, *supra* note 9 at 17-18 (discussing study that found Iowa prairie blocked all runoff in dry years and removed more than 75% of nitrogen in wet years when they had outflow); R.K. Neely & J.L. Baker J.R. Jones, V.P. Borofka & R.W. Bachman, *Factors Affecting Nutrient Loads in Some Iowa Streams*, 10 Water Research 117-121, at 120-121 (1976) (discussing increase in nutrient loads in streams with watersheds with fewer wetlands and more drainage).

[14] P. J. Phillips, J. M. Denver, R. J. Shedlock & P.A. Hamilton, *Effect of Forested Wetlands on Nitrate Concentrations in Ground Water and Surface Water on the Delmarva Peninsula*, 13 Wetlands 75-83 (1993).

[15] For studies in other watersheds, see Loucks, *supra* note 5, at 58 (summarizing series of studies showing that drainage of depressional wetlands resulted not only in increased peak flows but also in increased nitrogen and phosphorus concentrations to a downstream lake). *See also* R.W. Laney, *The Elimination of Isolated and Limited-Flow Wetlands in North Carolina*, Proceedings of the Symposium on Coastal

The development and drainage of isolated wetlands, as with other wetlands, can actually reverse water quality effects by releasing long trapped pollutants. Many wetlands trap toxic pollutants, such as mercury, lead, and PCBs in wetland soils where they are immobilized. When these wetland soils are excavated and placed alongside drainage ditches, the toxicants may be released from their bound form into the water where they can move downstream and cause harm to animal life and humans.[16]

Perhaps most simply, while the facts of this case involve the discharge of dredge or fill material under Section 404 of the Clean Water Act, this Court's decision will have equal significance for Section 402 of the Act, which regulates the discharge of other wastes. (All regulation under the Clean Water Act is tied to the definition of the term "discharge," which incorporates the term "navigable waters." *See* 33 U.S.C. Sec. 1362(12)). If regulation of isolated water bodies is impermissible, then the federal government equally cannot regulate the discharge of industrial waste or sewage into isolated lakes and ponds. Because of the many different ways in which water in isolated ponds and wetlands can reach flowing streams, any discharge of waste itself into these water bodies risks of contamination of these streams and downstream rivers as well.

Finally, many isolated wetlands affect water quality by holding water back during wet seasons and feeding the water slowly to streams and rivers through groundwater during the drier months of the year. This water is called

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Water Resources, American Water Resources Association (1988) (making similar finding in North Carolina).

[16] Office of Technology Assessment, U.S. Congress, Wetlands: Their Use and Regulation, 48-52 (1984); R.P. Gambrell, *Trace and Toxic Metals in Wetlands - A Review*, 23 J. Env'l Qual. 883-91 (1994).

"base flow," and it is what keeps streams from drying up during drier months. Base flow also helps keeps streams cool and dilutes pollution loads by creating sufficient flow. In coastal regions, this flow of fresh groundwater may help maintain a proper balance between fresh and saltwater in estuaries.[17] Drainage of any wetlands that recharge groundwater, whether isolated or not, can decrease this base flow to streams.[18]

In short, as this Court recognized in *Riverside Bayview Homes*, 474 U.S. at 133 (quoting legislative history), "'water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" This principle applies equally to "isolated" ponds and wetlands and to "adjacent wetlands."

B. Ecological Functions of Isolated Ponds and Wetlands

Riverside Bayview Homes did not just rely on the hydrological relationships between adjacent wetlands and larger water bodies as a ground for defining "waters of the United States." It also recognized the importance of purely biological linkages. It noted that adjacent wetlands "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." 474 U.S. at 134-35 (citations omitted).

Petitioner dismisses this form of linkage as secondary, but the Clean Water Act lists as its purposes the preservation not only of the "chemical" but also the "physical and biological integrity of the Nation's waters."

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[17] Council on Environmental Quality, *supra* note 8, at 103.

[18] *See generally* Winter, *et al.*, *supra* note 2, at 67. *See also* Loucks, *supra* note 5, at 56 (discussing how the drainage of depressional wetlands not only increased peak flows downstream but reduced downstream groundwater flows).

33 U.S.C. Sec. 1251(a). This Court has recognized this goal as "a condition in which the natural structure and function of ecosystems is maintained." *Riverside Bayview Homes*, 474 at 132. This Court has relied on this language not only in *Riverside Bayview Homes* but also in other cases to interpret the meaning of terms in the Act. For example, in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 714 (1994), this Court upheld the establishment of minimum flow limits below a dam under Section 401 of the Clean Water Act because it directly "reflects the Clean Water Act's goal of maintaining the 'chemical, physical and biological integrity of the Nation's waters.' " The Court noted that even the word "pollution" is defined to include not just chemical alterations of water but the "man induced alteration of the . . . physical [and] biological . . . integrity of water."

"Isolated" ponds, lakes, and wetlands do not just provide more habitat of the same type provided by other water bodies. Their habitat functions are in many cases distinct. Moreover, these distinct functions are interrelated with the functions of the other water bodies. Just as there are hydrological cycles, there are also biological cycles, and many aquatic animals use isolated water bodies for critical stages of their lives even while depending on flowing water bodies at other times.

Ducks and geese as a whole are particularly dependent on isolated wetlands. Part of the reason is that isolated wetlands provide seasonal oases of wet habitat in the relatively arid portions of the United States. Waterfowl need a combination of wintering habitats in the southern United States or central America, migratory "stopover" habitats in the central United States, and breeding habitats in the north. Their migrations are timed to the weeks when snow melt and spring rains form depressional wetland ponds in what are otherwise relatively dry landscapes.

Isolated wetlands and ponds also provide a valuable diversity of habitat for the simple reason that the water levels of isolated wetlands can be unrelated to those of nearby rivers - they can be wet when rivers are dry or visa versa. Shallow, isolated wetlands also tend to thaw earlier in spring than larger, more connected wetlands. These conditions allow early arriving waterfowl and other birds to feed on the insects and other invertebrates produced in these wetlands, which in turn enables them to build critical fat reserves necessary for successful nesting.[19]

Specific complexes of isolated ponds and wetlands therefore provide many of the most important habitats for waterfowl in the United States. One of the major wintering habitats in the United States consists of so-called playa lakes of the southern High Plains, including parts of New Mexico and Texas. Approximately 20,000 to 30,000 separate basins, covering 250,000 acres, provide winter habitat for approximately one million waterbirds, including ducks, geese, and cranes.[20]

The isolated wetlands and ponds of the Nebraska Rainwater Basin provide one of this country's important migratory habitats for waterfowl and many other species of waterbirds. Although most of these basins have been drained, the Rainwater Basin still consists of thousands of "isolated" wetland ponds in an area south of Nebraska's Platte River. These ponds form in depressions, within what was once prairie but is now farm fields, when they collect the melting snow around them. Although they may be inundated only through the early spring migration period,

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19 National Research Council of the National Academy of Sciences, Wetlands: Characteristics and Boundaries 156 (1995).

20 E.G. Bolen, *Playa Wetlands of the U.S. Southern High Plains: Their Values and Challenges for Management*, in B. Gopal (ed), Wetlands: Ecology and Management (1982).

between two and three million migratory waterfowl and a huge variety of shorebirds and wading birds use them, often for several weeks, as a rest and refueling stop on their northward migration precisely during this period. Some species are particularly dependent on these ponds, including 90% of the entire population of white-fronted geese and 50% of the mallards that use the mid-continental flyway.[21]

Moreover, the Rainwater Basin highlights the linkages between isolated water bodies and rivers. During the early weeks of spring migration, waterfowl move freely between the Platte and the marshes of the basin. And while the isolated wetlands meet the primary habitat and nutritional demands of waterfowl, the Platte probably serves as a "release valve" that migrating birds can rely on when the shallow basins are dry or locked in ice.[22]

The prairie pothole area is arguably the most important breeding habitat in North America for waterfowl. At least fifteen species of ducks nest in these potholes, including an estimated 70 to 90 percent of the continent's mallards (the most populous species), pintails, and canvasbacks. By some estimates, 50% of the total annual production of ducks comes from the potholes.[23] The ducks rely on all the

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21 Council on Environmental Quality, *supra*, note 8; G.L. Krapu, H.J. Reinecke, D.G. Jorde, and S.G. Simpson, *Spring Staging Ecology of Midcontinent Greater White-fronted Geese*, 59 J. Wildlife Management 736-746 (1995).

22 Jon Farrar, Nebraska Game & Parks Commission, Nebraska's Rainwater Basin (1996).

23 Thomas E. Dahl, Status of Prairie Pothole Wetlands in the United States (U.S. Fish & Wildlife Service 1990); H.A. Kantrud, G.L. Krapu & G.A. Swanson, Prairie Basin Wetlands of the Dakotas: A Community Profile, U.S. Fish & Wildlife Service Biological Report 85, at 15 (1989) (prairie pothole region, comprising only 10% of the waterfowl breeding area of the continent, produces 50% of North American ducks in an average year and more when water conditions are good).

different sizes of isolated wetlands, typically using different kinds of basins as the spring and summer progress.

Although Petitioner states that the connection between isolated wetlands and their effects on bird populations and therefore the recreational use of birds is attenuated, the connection is among the most well known in ecology. As early as 1969, a high correlation was demonstrated between the availability of isolated ponds in the prairie pothole area of North America in July and the size of the subsequent year's duck population.[24] A recent paper has shown that the risk of mallard nesting failure is eleven times higher when dry years in the prairie potholes reduce the acreage of seasonal, isolated wetlands.[25]

Ducks and geese, of course, also spend time along navigable rivers and coastal waters. But many of these birds were hatched in isolated ponds and wetlands by parents who also relied on isolated ponds and wetlands to build fat reserves needed for successful nesting. Mallards, for example, winter in large numbers along the major bottomland river systems of the south.[26] And canvasback ducks, whose annual migrations provide one of the great

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[24] W.F. Crissey, *Prairie Potholes from a Continental Viewpoint*, in Saskatoon Wetlands Seminar, Canadian Wildlife Service Report Series 6, 161-71 (1969).

[25] G.L. Krapu, P.J. Pietz, D.A. Brandt & R.R. Cox, Jr., *Factors Affecting Mallard Brood Survival in Prairie Pothole Landscapes*, 64 J. Wildlife Management 553-61 (2000).

[26] K.J. Reinecke, R.C. Barkley & C.K. Baxter, *Potential Effects of Changing Water Conditions on Mallards Wintering in the Mississippi Alluvial Valley*, in Waterfowl in Winter, Milton W. Weller (ed), 325-36 (1988).

sights on the wildlife refuges of the Upper Mississippi River, also breed primarily in prairie potholes.[27]

Ducks and geese therefore illustrate the important ecological relationship between isolated wetlands and ponds, and navigable water bodies. But other waterbirds also use both kinds of water bodies at different parts of their life cycles. Examples include sandhill cranes, which spend critical weeks each spring fattening on the Platte River in Nebraska, but that winter in large numbers on isolated lakes in West Texas,[28] and shorebirds such as the piping plover, which winters in coastal areas and uses sandbars in major rivers for some nesting, but also relies heavily on isolated lakes in the Prairie Pothole Region.[29]

While less visible than waterfowl and wading birds, amphibians and reptiles – including frogs, salamanders, snakes, and turtles – also play an important role in aquatic ecosystems that is illustrated by their sheer collective weight. In some ecosystems, they comprise a majority of the total living mass of vertebrate animals, and thus form an

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[27] *Compare* R.E. Stewart & H.A. Kantrud, *Ecological Distribution of Breeding Waterfowl Populations in North Dakota*, 37 J. Wildlife. Management 39-50 (1973) (discussing canvasback use of prairie potholes) *with* C.E. Korschgen, L.S. George & W.L. Green, *Feeding Ecology of Canvasbacks Staging on Pool 7 of the Upper Mississippi River*, in Weller, *supra* note 26, at 237-249.

[28] G.L. Krapu, G.C. Iverson, K.J. Reinecke & C.M. Boise, *Fat Deposition and Arctic-Nesting Sandhill Cranes*, 102 Auk 362-68 (discussing importance of growth in fat reserves at Platte River staging); T.C. Tacha, S.A. Nesbitt & P.A. Vohs, *Sandhill Crane*, in Migratory Shore and Upland Game Bird Management in North America 77-94 (1994) (discussing wintering on shallow saline lakes in West Texas).

[29] S.P. Elias, J.D. Fraser & P.A. Buckley, *Piping Plover Foraging Ecology in New York Barrier Islands*, 64 J. Wildlife Management 346-54 (2000).

important part of the food chain, eating insects and plants and, in turn, being eaten by fish and waterfowl.[30]

Amphibians as a whole rely heavily on isolated, often seasonal, wetland ponds for breeding or feeding sites. Many species prefer isolated ponds precisely because they harbor fewer predators such as fish that eat amphibian eggs and larvae.[31] For example, out of thirty-four species of amphibians at a highly-studied site in South Carolina, sixteen species depend on temporary wetlands for breeding.[32] This percentage is probably typical of amphibians generally.[33]

In addition to their value as breeding sites, isolated ponds also provide critical "ecological connectivity" for

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[30] Although amphibians are difficult to study, one major study site in the United States is Hubbard Brook, New Hampshire, where scientists have estimated that salamanders alone account for more than half of the total vertebrate biomass. T.M. Burton and G.E. Likens, *Salamander Populations and Biomass in the Hubbard Brook Experimental Forest, New Hampshire*," Copeia 541-546 (1975); T.M. Burton & G.E. Likens, *Energy Flow and Nutrient Cycling in Salamander Populations in the Hubbard Brook Experimental Forest, New Hampshire*, 56 Ecology 1068-1080 (1975).

[31] R.D. Semlitsch & J.R. Bodie, *Are Small, Isolated Wetlands Expendable?*, 12 Conservation Biology 1129-1133 (1998). For examples of studies showing the importance of isolated ponds and wetlands, see D.K. Skelly, E.E. Werner & S.A. Cortwright, *Long-term Distributional Dynamics of a Michigan Amphibian Assemblage*, 80 Ecology 2326-2337 (1999); D.K. Skelly, *Pond Drying, Predators, and the Distribution of Pseudacris Tadpoles*, Copeia 599-605 (1996); R.D. Semlitsch, *Allotopic Distribution of Two Salamanders: Effects of Fish Predation and Competitive Interactions*, Copeia 290-298 (1988).

[32] J. Whitfield Gibbons & Raymond D. Semlitsch, Guide to Amphibians and Reptiles of the Savannah River Site (1991).

[33] Roger Conant & Joseph T. Collins, A Field Guide to Reptiles and Amphibians: Eastern and Central North America (1991).

many amphibians. Changing conditions in water bodies can cause local species to become extinct, so the long-term presence of amphibians depends on the ability of other amphibians to recolonize sites after extinction. But individual amphibians have limited abilities to migrate long distances, often travelling less than one kilometer. Habitats must therefore be close enough together to allow successful migration among sites. Small isolated wetlands provide a sufficient density of aquatic habitat in some areas to allow amphibians to migrate and recolonize lost sites.[34]

Because they are themselves a food source for migratory waterfowl and wading birds, amphibians play an important function in the national aquatic system. But like many waterbirds, many amphibians that rely at some part of their life cycles on isolated ponds also use permanent streams and rivers at other seasons or parts of their life cycle, often as winter habitat.[35] Several recent studies of turtles highlight these interactions. A detailed study on the floodplain of the Missouri River demonstrated that turtles of several of the most abundant species, especially juveniles, use flooded temporary wetlands for feeding during the summer months and then migrate to a nearby river to spend the winter in deep protected waters.[36] Other species of

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[34] Semlitsch & Bodie, *supra* at note 31; *see also* J.P. Gibbs, *Wetland Loss and Biodiversity Conservation*, 14 Conservation Biology 314-317 (2000) (calculating how loss of some isolated wetlands can eliminate conditions for survival of amphibians in others).

[35] V.S. Lamoureux & D.M. Madison, *Overwintering Habitats of Radio-implanted Green Frogs, Rana clamitans*, 33 J. of Herpetology 430-435 (1999).

[36] J.R. Bodie & R.D.Semlitsch, *Spatial and Temporal Use of Floodplain Habitats by Lentic and Lotic Species of Aquatic Turtles*, 122 Oecologia 138-146 (2000).

turtles use more permanent aquatic habitats during droughts and small, isolated ponds during wet conditions.[37]

All of these conditions highlight a simple fact: Isolated water bodies are critical to the overall biological integrity of the nation's waters.

C. Practical Considerations

Petitioner asks this Court to ignore the close biological links between isolated ponds and wetlands and navigable waters largely on the grounds that regulation on that basis could lead to practical results it considers undesirable. It variously phrases these results as regulation of "seasonally wet areas in homeowners' backyards" or regulation of "any miniscule body of water capable of attracting a migrating duck." It also considers this result unconstitutional on the ground that the regulation of isolated waters puts the federal government into the business of local land use regulation.

In weighing these practical arguments, this Court may wish to consider factual information about the prevalence and importance of isolated wetlands. Petitioner accepts that regulation all streams and adjacent wetlands tributary to navigable waters is permissible under the Clean Water Act and under the Constitution. Although no precise estimate is available, it is the view of the scientists on this brief that probably no more than 20% of the roughly 100 million acres of wetlands in the contiguous United States could be

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[37] K.R. Matthews & K.L. Pope, *A Telemetric Study of the Movement Patterns and Habitat Use of Rana muscosa, the Mountain Yellow-legged Frog, in a High-elevation Basin in Kings Canyon National Park, California*, 33 J. of Herpetology 615-624 (1999); T.E. Graham, *Habitat Use and Population Parameters of the Spotted Turtle, Clemmys guttata, a Species of Special Concern in Massachusetts*, 1 Chelonian Conservation Biology 207-214 (1995); D. Moll, *Population Sizes and Foraging Ecology in a Tropical Freshwater Stream Turtle Community*, 24 J. of Herpetology 48-53 (1990).

characterized as isolated.[38] This means that protection of isolated wetlands constitutes roughly 1% of the total land in the contiguous 48 states (roughly two billion acres), compared to the roughly 4% of the country occupied by other wetlands that Petitioner agrees are appropriately waters of the United States. It is not clear therefore why regulation of isolated water bodies takes the regulatory program into an area unlike that which Petitioner already finds acceptable.

And while it is possible that isolated wetlands and ponds can be found in backyards – just as small streams and the surrounding wetlands are found in backyards – that does not mean that every wet spot can be regulated as a water body. To be protected, an area must also constitute a water body and must therefore meet wetness criteria. The water bodies at issue in this case are relatively deep ponds, but at the drier end of the spectrum of wetlands, where the criteria normally require that water be present long enough to result in a predominance of vegetation adapted to at least saturated soil conditions. *Riverside Bayview Homes*, 474 U.S. at 124-25. In other words, the mere fact that a duck uses a damp spot does not automatically make it a regulated water body.

On the other hand, protection of the biological integrity of the nation's aquatic ecosystems is simply not possible

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[38] For estimated total wetland acreage in the contiguous 48 states, see Council of Environmental Quality, *supra* note 8, at 100 (putting estimate at 95 million acres). We have been unable to find any documented estimate of the percentage of wetland or pond acres that are isolated probably because "isolated" is largely a matter of degree and because scientists do not consider this term to be particularly useful in distinguishing different wetland functions. Despite this lack of a clear estimate, there is a general consensus among wetland scientists that isolated wetlands are unlikely to exceed 20% of the total acreage of wetlands.

without protection of isolated lakes, ponds, and wetlands. This is true not only because of their ecological linkages to navigable waters discussed above, but also because isolated water bodies (while a modest minority of wetlands nationally) can form much of the entire aquatic ecosystem in critical areas. While officials in Illinois recently estimated, in preparation for this case, that only around 15% of all wetlands remaining in the state are "isolated,"[39] prairie potholes comprise 93% of the total water/wetland surface area in the prairie pothole area of North Dakota, a majority of the state's territory.[40] Moreover, wetlands in North Dakota hold the vast majority of the state's surface storage apart from that provided by two man-made reservoirs.[41]

Moreover, while Petitioner focuses attention on backyards, Petitioner's statutory theory would exclude not merely isolated wetlands, but large isolated lakes as well because they too do not flow by surface water into navigable water bodies. There are more than 22 million acres of lakes in the United States, including 100,000 lakes

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[39] The Illinois Department of Natural Resources has estimated that isolated wetlands in Illinois comprise roughly 12% of the wetland acreage. *See* Memo from Ryan Taylor, Illinois Department of Natural Resources to Marvin Hubbell, Illinois Department of Natural Resources Regarding "Isolated Wetlands Analysis," (Sept. 18, 2000). This estimate may be an overestimate, however, since the analysis combined both truly isolated wetlands and those wetlands adjacent to small, headwater streams.

[40] Daniel E. Hubbard, Glaciated Prairie Wetland Functions and Values: A Synthesis of the Literature, U.S. Fish & Wildlife Service Biological Report 7 (1988); for a map showing the portion of North Dakota in the prairie pothole region, see *id*. at 2.

[41] D. Ripley, *An Overview of North Dakota's Water Resources*, in North Dakota Water Quality Symposium (North Dakota State Extension Service March 20-21, 1990).

with more than 100 acres.[42] An unknown number of these lakes are "isolated," but isolated lakes can be very large, including Utah Lake and Lake Tahoe in California and Nevada.

In these landscapes in particular, isolated water bodies are not merely important because of their relationships to other water bodies; they are relied upon for all of the basic functions that may elsewhere be served by rivers and connected lakes. Both large isolated lakes and smaller isolated ponds are used for fishing (isolated wetlands are a major source of the country's bait fish).[43] They may also serve as an important source of drinking water for cattle and irrigation water for crops.[44] Perhaps most important, many isolated wetlands are a major source of groundwater recharge, including recharge for major aquifers like the Ogallala[45] – a function that can be lost or greatly reduced if the water is drained into streams.

Petitioner's theory of the Clean Water Act would preclude protection of all isolated water bodies because of

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[42] National Research Council of the National Academy of Sciences, Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy 89 (1992).

[43] *See* Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984) (noting that Utah Lake supported "the State's most valuable water fishery which markets most of the catch out of state"); Hubbard, *supra* note 40, at 30 (prairie pothole wetlands are important to the commercial baitfish industry).

[44] *See* Utah v. Marsh, 740 F.2d at 803; H.A. Kantrud, *supra* note 23, at 33 (prairie potholes used to graze cattle, sheep, and horses); E.G. Bolen, L.M. Smith & H.L. Schramm, Jr., *Prairie Wetlands of the Southern High Plains*," 39 BioScience 615-23, 619 (playa lakes are used for irrigation and grazing).

[45] Carter, *supra* note 4, at 44 (playa lakes in West Texas and New Mexico are major source of recharge to Ogallala aquifer).

their lack of relationship to navigable waters, and it would do so not merely under Section 404 of the Clean Water Act but also under Section 402, which regulates the discharge of waste. See discussion, *supra*. Petitioner would therefore even bar regulation of sewage or industrial discharges into lakes as large as Utah Lake.

The purposes of the Clean Water Act, to preserve the "chemical, physical and biological integrity of the nation's waters," appear to have little to do with navigation. In general, this Court has frequently held that the "object" of statutes "is the surest guide to their meaning." *Watt v. Alaska*, 451 U.S. 259, 266 n. 9 (1981) (citations omitted) and that an agency interpretation that "frustrate[s] the policy that Congress sought to implement" is unreasonable. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). It would not be possible to protect the integrity of the nation's waters without equally addressing isolated lakes, ponds, and wetlands.

D. The Ecological and Hydrologic Relationship Between the Balefill Site and the Broader Aquatic Ecosystem

Although presented to this Court as a case solely concerned with the protection of migratory birds, this case actually encompasses the broad hydrological and biological functions of isolated water bodies. The Corps of Engineers needs a simple jurisdictional test for waters of the United States because many functions of water bodies or potential harm from their loss or pollution only become evident after the analysis undertaken through the permit process. The Corps therefore asserted jurisdiction in this case because of use by migratory birds. But the final decision denying the permit found many potential environmental impacts that the Corps could presumably also have used to identify connections to commerce. This case therefore illustrates

why it is appropriate that threshold jurisdictional tests, whether statutory or constitutional, should focus on the likely functions of water bodies as a group.

According to one of the reports submitted by SWANCC, the site contains twenty-one acres of ponds ranging from six feet to thirteen feet in depth. Inventory of Fish at the SWANCC Balefile Site, A.R. 40313-15. SWANCC's expert collected ten species of fish, including such sportfish as largemouth bass, bluegill, carp, and grass pickerel, and noted that a sport fishery existed on the site. *Id*. The site contains salamanders, toads, frogs, and turtles that breed in the isolated ponds. Inventory of Herpetofauna at the SWANCC Balefill Site, A.R. 40401-03. The site also contains an exceptionally diverse variety of bird species, with at least 128 species. Fish & Wildlife Coordination Act Report, A.R. 16383. Perhaps most important, the site contains what the U.S. Fish & Wildlife Service (FWS) called the second largest heron rookery in northern Illinois with more than 130 birds, 15% of the region's herons. A.R. 16386-88. Great blue heron rookery sites are rare because herons nest primarily in locations that can support many birds with a combination of high trees for nesting, and abundant shallow waters and saturated wetland soils to produce sufficient food – such as the amphibians – for adult herons and their young.

According to the U.S. Fish & Wildlife Service, these biological riches are "due to the complex interspersion of habitat features, including semi-permanent ponds, saturated soils, drainageways, and ridge crests." Department of the Army Permit Evaluation and Decision Document, A.R. 15582 (summarizing comments of FWS). In other words, this site illustrates why aquatic animals rely on a diversity of aquatic habitats, including isolated wetlands. And the fact that great blue herons are spectacular inhabitants also of large rivers and wetlands such as the Everglades highlights

the ecological interdependence between the ecology of those systems and isolated wetlands and ponds.[46]

The site also illustrates the hydrologic significance of isolated isolated water bodies. It holds enough water to fill the Pentagon four feet deep. Faced with a proposal to fill it with a landfill, an obvious question to any hydrologist is where will the water go that is now captured by the site. Any development needs a stormwater management plan for rainfall, but developing water bodies usually makes the potential impacts greater because it displaces a storage area. Absent strict controls, this water could easily end up directly or indirectly in the Fox River, less than two miles from the site, which in turn flows into the navigable Illinois and Mississippi Rivers.

To address this question, SWANCC's application included a Stormwater Management Plan. It promised large detention basins designed to capture almost all the runoff from huge storms, but it still proposed to bypass some flows into a ditch flowing offsite to the north. Stormwater Management Plan, A.R. 219-26. The record does not reveal where the ditch eventually flows. But the Corps ultimately denied the permit in part because it believed that "stormwater volumes and associated sediment coming off the landfill could be significantly larger" than that described by SWANCC. Decision Document, A.R. 15645-15647. Faced with what it considered faulty calculations, the Corps never bothered to analyze the potential downstream effects.

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[46] *See* Paul Ehrlich, David S. Dobkin & Darryl Wheye, The Birder's Handbook: A Field Guide to the Natural History of North American Birds 42 (1988); Wayne Huffman, G. Thomas Bancroft & Richard J. Sawicki, *Relationships Among Wading Bird Foraging Patterns, Colony Locations, and Hydrology in the Everglades*, in Steve M. Davis & John C. Ogden, Everglades: The Ecosystem and its Restoration 585-614, at 593 & 596 (1994).

Whether the Corps was correct or not, this case illustrates one of the hydrologic reasons to regulate the filling of "isolated" waters: The water has to go somewhere, and that creates a serious potential for downstream water quantity and pollution problems.

Another obvious concern presented by siting a landfill in a pond is the threat of contamination because it increases the likelihood that water will come into contact with waste material. As the Corps stated in its permit decision, "We believe that the site conditions of the proposed project do not provide the best landfill siting conditions because of the projects [sic] close proximity to potable groundwater supplies." A.R. 15652 In this case, a primary concern of the permitting process was whether the landfill would in the long run contaminate the Newark Aquifer, a major drinking water source for thousands of people. A.R.15653. The Corps of Engineers acknowledged that "heroic" engineering efforts, combined with long-term monitoring and control of landfill "leachate" could protect the aquifer. But the Corps found that SWANCC had not made proper financial allowance for the long-term maintenance of the site, and it considered the risks ultimately unacceptable in light of other good waste disposal options. Decision Document at 15649-53. Even if the permit had been granted with the conditions proposed by SWANCC, this case would still illustrate the role of the permit to address the potential effects of discharging pollutants into isolated water bodies.

Petitioner repeatedly asks this Court to think about the miniscule damp spot in the backyard. But the precise question in this case is whether the federal government has the authority to regulate the construction of a landfill on twenty-one acres of ponds as much as thirteen feet deep that support a recreational fishery and a huge rookery for migrating great blue herons, and under conditions that

threaten off-site flooding, and contamination of drinking water supplies for thousands of people.

CONCLUSION

For the foregoing reasons, amici urge this Court to conclude that the regulation of discharges into isolated ponds and wetlands in general and in this case is authorized by the Clean Water Act and the Commerce Clause of the U.S. Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX A

BRIEF BIOGRAPHIES

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Dr. Joy Zedler is Aldo Leopold Chair of Restoration Ecology at the University of Wisconsin and a former member of the National Academy of Science's Water Science and Technology Board. She is presently chairing a panel of the National Academy of Sciences studying wetland mitigation and previously served on panels that analyzed wetland identification and classification and restoration of aquatic ecosystems.

Dr. Bill Mitsch is Professor of Natural Resources and Environmental Science at Ohio State University. The coauthor of the leading textbook on wetlands among a large number of other publications, he is the editor-in-chief of Ecological Engineering and chaired the 1992 INTECOL conference on wetlands. He served on a panel established by the National Academy of Sciences to advise Congress on wetland identification and classification, and is presently serving on a panel to evaluate wetland mitigation.

Dr. Rebecca R. Sharitz is a Professor of Botany at the University of Georgia and a Senior Research Ecologist at the Savannah River Ecology Laboratory, where she previously served as director. She serves as Secretary General of the International Association of Ecology, and has served on National Academy of Sciences' panels regarding restoration of aquatic ecosystems and restoration of the Everglades system.

Dr. Joseph Larson, Professor Emeritus of the University of Massachusetts, developed the first models for functional assessment of freshwater wetlands and for predicting wildlife species habitat in New England freshwater wetlands. He has been a U.S. delegate to the meetings of the contracting nations under the RAMSAR treaty on wetlands of international importance. He was awarded the national Chevron Conservation Award for his work on wetlands and was the founding Executive Chairman of the National Wetlands Technical Council.

Dr. Leigh H. Fredrickson is Rucker Professor of Fisheries and Wildlife at the University of Missouri and Director of Gaylord Memorial Laboratory. He is the author of innumerable articles and books on waterfowl, waterbirds, and wetlands, and is considered by many the dean of American waterfowl scientists.

Dr. Mark Brinson is Professor of Biology at East Carolina University and is a leading expert on the cycling of nitrogen, phosphorus, and carbon in wetlands. He served on National Academy of Sciences panel to evaluate wetland identification and classification.

Dr. Orie Loucks is Ohio Eminent Scholar in Applied Ecosystem Studies and Professor of Zoology at Miami University of Ohio. The author of more than 200 scientific publications, he served ten years on the National Academy of Science's Board on Water Science and Technology, and also on the Science Advisory Board of the International Joint Commission, and the Board of Governors of The Nature Conservancy. He is an elected Fellow of the Ohio Academy of Sciences and the American Association for the Advancement of Science, and was given the Distinguished Service Award of the American Institute for Biological Sciences in 1994.

Dr. Stuart Pimm is Professor of Conservation Biology at the Center for Environmental Research and Conservation at Columbia University. His awards include a Pew Fellowship in Conservation and the Environment, and the Kempe Prize for Distinguished Ecologist. He is author of roughly 200 published papers and three books, including the widely aclaimed The Balance of Nature.

Dr. Raymond Semlitsch is Professor of Biology at the University of Missouri. One of this country's leading experts on amphibians, he has published more than 100 articles, including many of the leading papers on the use of isolated wetlands by amphibians.

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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ENVIRONMENTAL DEFENSE, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, CHESAPEAKE BAY FOUNDATION, WORLD WILDLIFE FUND, AND DEFENDERS OF WILDLIFE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) 11, 25
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Maryland v. Wirtz, 392 U.S. 183 (1968) 25
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40 C.F.R. § 230.3(s)(3) 23
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123 Cong. Rec. 34,852 (1977) 14
123 Cong. Rec. 39,209 (1977) 14
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Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995) 17
OTA, U.S. Congress, *Wetlands: Their Use and Regulation* (1984) 23
Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* (ABA 1998) 27
1 Secretary of the Interior, *The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region* (1988) 24
U.S. Fish & Wildlife Service, *1996 National Survey of Fishing, Hunting & Wildlife Associated Recreation* (1997) 23, 24

OTHER AUTHORITIES

43 Op. Att'y Gen. No. 15 (Sept. 5, 1979) 12

This case presents the question whether Congress, under the Commerce Clause and the Clean Water Act, has power to regulate economic activities that pollute or destroy intrastate surface waters, where those waters are used as habitat by migratory birds. The answer to this question, entirely consistent with this Court's opinions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 120 S. Ct. 1740 (2000), is yes.

INTEREST OF AMICI CURIAE

Amici are national nonprofit organizations with strong interests in the protection of water resources and conservation of habitat and wildlife.[1] With a total of more than 2 4 million members collectively throughout the United States, amici strongly support Congress's power to enact legislation protecting the environment and the Clean Water Act's purpose of "restoring and maintaining the physical, chemical and biological integrity of our Nation's waters."

Petitioner, the Solid Waste Agency of Northern Cook County ("SWANCC"), argues that its proposed landfill and the resulting water pollution are not subject to federal regulation because the Clean Water Act protects only "navigable" waters of the United States and waters that are adjacent to such navigable waters. Alternatively, SWANCC argues that Congress does not have power under the Commerce Clause to regulate water pollution resulting from construction and operation of the proposed landfill.

If adopted, SWANCC's interpretation of the Clean Water Act would roll back the scope of federal water pollution control to the pre-Act 1960s, invalidating much of

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[1] Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than amici and their counsel, made any monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters have been filed with the Clerk.

the current federal regulation of water pollution, including point source industrial discharges, into lakes and ponds, wetlands, and intermittent streams. Millions of acres of "isolated" surface waters and wetlands throughout the Nation would be removed from federal protection under this interpretation.

SWANCC's constitutional theory would have even more far-reaching consequences, effectively overruling the rational basis test applied by this Court for more than sixty years in Commerce Clause cases involving regulation of economic activities, and subjecting jurisdictional nexus tests under the Clean Water Act and dozens of other federal regulatory programs to a new, strict scrutiny standard of review.

Amici file this brief pursuant to this Court's Rule 37, in the interest of clarifying the statutory and constitutional basis for the well-established, plenary authority of Congress and the Executive Branch to regulate economic activities that threaten our Nation's water resources and wildlife.

STATEMENT

SWANCC is a corporation formed by a consortium of 23 municipalities under Illinois state law. During the late 1980's, SWANCC proposed to construct and operate a landfill in Northern Cook County, Illinois. (A.R. 15573.)[2] As originally proposed, the landfill would cover approximately 410 acres, including 298 acres of forest, and would require the discharge of fill material — a pollutant under the Clean Water Act — into 31 acres of ponds and other on-site surface waters. (A.R. 15573-74.) The landfill would have total economic impacts of $69 million and would receive hundreds of thousands of tons of solid waste per year. (A.R. 15635, 15622.)

The landfill was proposed to be located at a site of significant ecological value. Undisturbed since the early

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[2] References to "A.R." are to the Administrative Record below.

1950's, the site includes a number of ponds, up to six feet deep, and teems with birds, fish and wildlife. (A.R. 15669.) The site is used as habitat by many species of water-dependent migratory birds, including a sizeable rookery of great blue herons, a colonial nesting bird that is among the largest water birds in North America. (A.R. 15578; 15697-700.)

In 1990, SWANCC requested a determination by Respondent, the U.S. Army Corps of Engineers ("Corps"), whether construction and operation of the landfill would require a permit under the Clean Water Act. After extensive administrative review, the Corps determined that because 31 acres of waters proposed to be polluted or destroyed by the landfill were used as habitat by scores of nesting great blue herons and approximately 120 other species of migratory birds, SWANCC was required to obtain a permit. (A.R. 780-81, 15578, 15582, 34636.)

SWANCC's permit application described several potential environmental hazards posed by the landfill, including discharges of leachate contaminated by hazardous organic chemicals. (A.R. 15666-67, 15717.) Following lengthy permit proceedings, the Corps determined that the proposed landfill posed significant environmental risks, including potential contamination of a major drinking water source for several local communities. (A.R. 15721.) The Corps found that pollution of waters at the site would harm many of the migratory birds that nested and foraged there. (A.R. 15692-710, 15654-55.) In addition, the Corps found that the proposed stormwater management plan for the landfill was insufficient, threatening contamination of nearby wetlands in the event of greater than average rainfall events. (A.R. 15645-47.) Because SWANCC did not propose effective mitigation measures to address these harms, the Corps denied the permit application. (A.R. 15658-59.) SWANCC did not challenge the Corps' findings below; it voluntarily dismissed all of its claims other than the constitutional and statutory arguments that are presented

here. *See SWANCC v. Corps*, 191 F.3d 845, 849 (7th Cir. 1999).

SUMMARY OF ARGUMENT

In 1972, Congress passed the Federal Water Pollution Control Act ("Clean Water Act" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Responding to the failure of state and local governments to avert what had become a national water pollution crisis, Congress created a comprehensive, federal water pollution control program establishing nationwide standards and federal permitting and enforcement procedures.

The Clean Water Act regulates activities that cause pollution of "navigable waters," defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). By 1977, the U.S. Environmental Protection Agency ("EPA") and the Corps, jointly charged by Congress with responsibility for administering the Act, had determined that the phrase "waters of the United States" was intended by Congress to extend to "all waters within the reach of the Commerce Clause power," and had promulgated regulations implementing that interpretation. The numerous federal courts that have ruled on the issue since 1972 have uniformly agreed with EPA and the Corps, holding that the phrase "waters of the United States" is to be "given the broadest possible constitutional interpretation." This conclusion is compelled by the text and structure of the Act, its purposes and goals, and legislative history. This Court has held that the Corps' determinations regarding the scope of its jurisdiction under the Act are to be given deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The Corps' interpretation here clearly "is reasonable, in light of the language, policies, and legislative history of the Act." *Id.* at 133.

SWANCC argues that the Act must include a "navigability" requirement because of the use of the term

"navigable waters," even though that term is defined to include all "waters of the United States." But the statute's history refutes this argument. "Navigable waters" operates as a definitional term that was held over from prior federal water pollution legislation dating back to the Rivers and Harbors Act of 1899. In 1972, Congress chose to redefine that term, rather than replace it, but did so in enacting a comprehensive long-range policy for the elimination of water pollution that does not make any reference to "navigation" or "navigability" elsewhere in the text of the statute. Moreover, Congress ratified the settled interpretation of this term as meaning all waters of the United States within the Commerce Clause power when it substantially amended the Clean Water Act in 1977 and 1987, well after that interpretation had been established by the Executive Branch agencies and uniformly upheld in the federal courts. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). Thus, the principal issue in this case is whether Congress has power under the Commerce Clause to regulate SWANCC's landfill pollution.

Article I, § 8 of the Constitution grants the federal government power to "regulate Commerce . . . among the several States." This includes commerce that "concerns more States than one," or "affects other States," even if the regulated activity occurs within a single state. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

Water pollution is a quintessential example of a national problem, having substantial cumulative impacts on interstate commerce, that requires a uniform, nationwide solution. Federal regulation of intrastate activities that cause environmental degradation has long been held to be within the Commerce Clause power. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981).

This Court consistently has held that where Congress is regulating economic activity, deference must be accorded to the judgments of the Legislative and Executive branches regarding effects on interstate commerce. *See Gibbons*, 22 U.S. (9 Wheat.) at 197. If there is a rational basis for finding

that the regulated economic activity, in the aggregate, may have interstate effects, and where the regulations are reasonably tailored to address the underlying problem, the courts will not substitute their judgments for those of the political branches of government. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000).

The Clean Water Act regulates economic activity. The activities regulated under the Act that result in discharges of pollutants to surface waters — land development, manufacturing, agriculture, mining, construction, and waste disposal, for example — are overwhelmingly and obviously commercial in nature. This case in particular involves federal regulation of economic activity. SWANCC proposed to build and operate a $69 million landfill that would receive hundreds of thousands of tons of solid waste, generate millions of dollars of revenues annually, and employ 81 full-time workers. The business of solid waste disposal is "commerce." *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Since they have power to regulate intrastate economic activity only where it has a sufficient nexus with interstate commerce to confer federal jurisdiction, EPA and the Corps have developed a number of tests to determine such a nexus on a case-by-case basis. In this case, federal jurisdiction was based on the undisputed fact that ponds and other surface waters that would be polluted by the proposed SWANCC landfill were used as nesting, breeding, and foraging habitat by 121 species of migratory birds.

Migratory birds are the basis of substantial interstate economic activities, including migratory bird hunting (a $1.3 billion dollar annual industry) and migratory bird watching (14.3 million trips annually specifically to observe, feed or photograph waterfowl, many of them across state lines). Congress has formally determined that pollution and

destruction of surface waters and wetlands nationwide threatens the very survival of many migratory bird species, including endangered species, and that the loss of these species would cause profound, long-term economic consequences for our Nation. A rational basis clearly exists for determining that pollution and destruction of waters used by migratory birds would, in the aggregate, substantially affect interstate commerce, and the Clean Water Act permit program is reasonably tailored to address that harm. Where the elected branches of government and expert administrative agencies have so thoroughly considered a matter, this Court should not substitute its judgment for their economic and scientific findings regarding effects on interstate commerce. "The judicial task is at an end once the [C]ourt determines that Congress acted rationally in adopting a particular regulatory scheme." *Hodel*, 452 U.S. at 276.

The Court's decisions in *Lopez* and *Morrison* do not alter this analysis. Those cases expressly did *not* overturn the Court's Commerce Clause jurisprudence of the last sixty years. In enacting the statutes challenged in *Lopez* and *Morrison*, Congress sought to regulate *social* problems, not economic activity. Since the regulated activities were non-economic, the Court determined that the deferential standard of review traditionally applied in Commerce Clause analysis was inappropriate. By contrast, Congress through the Clean Water Act is regulating commerce directly. In this case, the Corps, through the Clean Water Act permit process, restricted and conditioned the pollution of surface waters proposed as part of the development and operation of a solid waste landfill, an obviously "economic endeavor." *Morrison*, 120 S. Ct. at 1750.

Even if *Lopez* and *Morrison* applied, Clean Water Act regulation of intrastate waters clearly meets the standards of those cases. Water pollution regulation is not an area of traditional local control. The federal government has regulated water pollution since 1899, and has exercised comprehensive regulatory power over pollution of waters of

the United States for nearly thirty years. Nor did the Corps in this case impermissibly act as a zoning authority or land use planner. The Corps reviewed and denied SWANCC's permit application because of the substantial *environmental* harms threatened by the proposed landfill, and did not otherwise attempt to exercise traditional land use functions. It is irrelevant that federal environmental regulation may preempt exercises of state police power, including land use power. *Hodel*, 452 U.S. at 291-92.

Finally, the Corps' application of the migratory bird jurisdictional nexus test over the last fifteen years has not resulted in limitless federal regulation. Many federal statutes intensively regulate activities at the local level, including the Fair Labor Standards Act, Occupational Safety and Health Act, the Clean Air Act, the Americans With Disabilities Act, the Resource Conservation and Recovery Act, the Superfund law, the Clean Water Act, and dozens of other federal programs. For Commerce Clause purposes, however, these regulatory programs are not "limitless" — they are constrained to that which is appropriately national by the terms of the regulations themselves. Here, the Corps' regulation is limited to pollution of waters that are used as habitat by migratory birds.

SWANCC in effect asks the Court to determine, under the guise of Commerce Clause analysis, that federal authority here is inappropriate as a matter of policy, and that power to regulate pollution of isolated water bodies should be returned to the states. Aside from being wrong under settled Commerce Clause jurisprudence, SWANCC's approach would fundamentally restructure the balance of power at the federal level as well, establishing the courts as the substantive decision-makers with regard to numerous technical and economic analyses conducted to determine federal jurisdiction under many different statutes. Since 1937, the Court has consistently declined to assume that role, and it should not do so in this case.

The Court instead should affirm that federal statutes having a primary effect of regulating commerce, including the Clean Water Act, are authorized under the Commerce Clause where there is a rational basis for determining that the regulated activities, taken in the aggregate, may substantially affect interstate commerce. In this case, there is a rational basis for the conclusion that pollution of intrastate surface waters used as habitat by migratory birds, taken in the aggregate, would substantially affect interstate commerce. The Corps was fully authorized to regulate water pollution that would result from construction and operation of the SWANCC solid waste landfill. Accordingly, the Court should affirm the judgment of the Court of Appeals for the Seventh Circuit.

ARGUMENT

I. THE CLEAN WATER ACT REGULATES POLLUTION OF ISOLATED, INTRASTATE WATERS TO THE MAXIMUM EXTENT OF CONGRESS'S COMMERCE CLAUSE POWER

A. The Clean Water Act Regulates Pollution of All "Waters of the United States," Regardless of Navigability

1. Congress enacted the Clean Water Act in 1972, establishing a comprehensive federal program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Prior to 1970, responsibility for regulation of water pollution had largely been left to state and local authorities. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981). By 1972, however, water pollution had become a national crisis; the state-led system proved to be "ineffective," *id.*, and "inadequate in every vital aspect." S. Rep. No. 92- 414, at 7, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674 (cited in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)).

Congress determined that a comprehensive federal water pollution regulatory program was necessary for several reasons. First, water pollution — of any substantial body of water — is a problem that inherently crosses state boundaries. "Water moves in hydrologic cycles [of evaporation and precipitation] and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. at 3742. Pollution or destruction of water resources in one state may cause adverse environmental consequences far beyond that state's borders. *See Middlesex County*, 453 U.S. at 11 (1981).

Second, virtually all significant direct discharges of pollutants result from economic activities, such as industrial production, land development, agriculture, and solid waste disposal. The harm caused to water resources by those activities represents an economic externality of economic activities — a cost of goods or services that may not be borne by the seller or passed along to the consumer. States and localities seek to attract economic investment, to build local tax bases, and to provide services to residents at the lowest possible cost. They have strong disincentives to enforce programs that shift substantial external costs back to the businesses and municipal entities that create them. Congress therefore determined that minimum federal standards were necessary to avoid a continued "race to the bottom" of states relaxing environmental requirements (or refusing to enforce them) in order to attract business. *See* S. Rep. No. 92-414, at 5, *reprinted in* 1972 U.S.C.C.A.N. at 3671-72 (noting lax state enforcement of pre-1970 water pollution control programs).

The Act prohibits "the discharge of any pollutant by any person," into any "waters of the United States" unless authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(7). Congress divided federal responsibilities for implementing and enforcing the Clean Water Act permit program between EPA and the Corps. Under Section 404 of the Act, the Corps

administers permits "for the discharge of dredged or fill material" at specified disposal sites. 33 U.S.C. § 1344.

2. The Clean Water Act regulates pollution of "navigable waters," which are defined in the Act as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Seventh Circuit and all six of the other courts of appeals that have squarely addressed the question have held that the phrase "waters of the United States" "reaches as many waters as the Commerce Clause allows."[3] Similarly, this Court has noted that the term "navigable" as used in the Act has "limited import," *Riverside Bayview*, 474 U.S. at 133, and that "the Act applies to virtually all surface water in the country," *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987).

SWANCC's attempt to limit federal protection under the Clean Water Act to "navigable" and immediately adjacent waters directly conflicts with these rulings and with the purpose of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act expressly seeks to protect water quality to "provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution." *Riverside Bayview*, 474 U.S. at 132-33. By contrast, the Act does not refer to navigation among its purposes nor does it

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[3] *See SWANCC v. Corps*, 191 F.3d 845, 845 (7th Cir. 1999); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *United States v. Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-15 (5th Cir. 1983); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30 (10th Cir. 1985); *United States v. Eidson*, 108 F.3d 1336, 1341 (11th Cir. 1997).

include any requirement intended to address navigability. The Court should "give effect to congressional purpose so long as the congressional language does not itself bar that result." *Johnson v. United States*, 120 S. Ct. 1795, 1805 n.10 (2000).

3. Even if there were any ambiguity with regard to this point in the original text of the Act, EPA and the Corps have undertaken extensive rulemaking and other administrative proceedings in establishing the broad meaning of "waters of the United States."[4] The Court has held that *Chevron* deference is granted to the Corps' interpretation of the scope of its jurisdiction under the Clean Water Act. *Riverside Bayview*, 474 U.S. at 133. "Accordingly, our review is limited to whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction" in this case. *Id.* at 131.

4. SWANCC argues that because Congress is presumed not to use words that have no operative effect, a "navigability" requirement must be read back into the definition of "waters of the United States." (Pet. Br. at 18.) The use and relationship of these terms is readily explained by the history of federal water pollution regulation. Congress has regulated water pollution since 1899. In the Rivers and Harbors Appropriations Act of 1899 ("RHA"), a predecessor to the Clean Water Act, protecting navigability was a primary statutory purpose. Section 13 of the RHA — known as the Refuse Act — prohibited the discharge of "refuse matter of

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[4] EPA considered the Clean Water Act definitional issues prior to and at greater length than the Corps, and had ultimate administrative authority for determining the reach of the term "waters of the United States." 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). SWANCC challenges the history of the Corps' regulation, but fails to note that the Corps relied largely on EPA — the expert agency charged by Congress with primary responsibility to implement much of the Clean Water Act — in promulgating the Corps' regulation.

any kind" into "navigable water of the United States." 33 U.S.C. § 407. Later amendments of the RHA and new federal water legislation in 1940 continued to use the jurisdictional term "navigable waters." The current version of the Clean Water Act was enacted as an amendment to the water pollution statutes in existence in 1972, which had their origin in the 1899 RHA. Rather than replace the term "navigable waters," Congress redefined it to extend to all "waters of the United States." Thus, the term continues to have an "operative effect" as the subject of the expansive definition that Congress put in place in 1972. However, it does not limit or affect the scope of the Act in any way.

B. In Amending the Clean Water Act, Congress Ratified the Settled Judicial and Administrative Interpretation of "Waters of the United States" as Extending to the Maximum Reach of Congress's Commerce Clause Power.

In 1977 and 1987, Congress passed sweeping amendments to the Clean Water Act, but did not alter the established definition of "waters of the United States" as extending to the limits of federal power under the Commerce Clause. By doing so, Congress ratified the existing interpretation. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

The definition of "waters of the United States" to include those waters, the use or misuse of which could affect interstate commerce, was first promulgated in 1975. *See* 40 Fed. Reg. 31,320 (1975). In 1977, Congress reexamined the definition of "navigable waters" under the Act. H.R. 3199, introduced by Congressman Roberts, would have redefined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." H.R. 3199, 95th Cong. 39 (1977). S. 1952, introduced by Senator Edmund Muskie, rejected the change and left the definition of "navigable waters" intact,

reflecting the committee's intention "to assure continued protection of all the Nation's waters." S. Rep. No. 95-370, at 75, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4400.

A proposal by Senator Bentsen to amend S. 1952 to limit the definition of "navigable waters" to waters "presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce" was also rejected. Senate Debate, Aug. 4, 1977, *reprinted in* 4 *A Legislative History of the Federal Water Pollution Control Act Amendments of 1977*, at 901, 911 (1978) ("Committee Print" compiled for the Committee on Public Works by the Library of Congress). A number of members of Congress noted that jurisdiction under the Act extended to isolated, intrastate waters. *See* 123 Cong. Rec. 26,711 (1977) (statement of Sen. Bentsen) (warning that if the Act were not amended, "[t]he [Section 404] program would still cover all waters of the United States, including small streams, ponds, [and] isolated marshes . . ."); 123 Cong. Rec. 34,852 (1977) (Rep. Abdnor, extension of remarks) (explaining that the Corps was asserting jurisdiction over "all waters — from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes"). After heated debate in both the Senate and the House, and consideration of the five years of Corps and EPA implementation, Congress made no changes to the definition of "navigable waters." Committee Print at 938; *see* 123 Cong. Rec. 39,209 (1977) (statement of Senator Baker) (the 1977 Amendments "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [Act] to control pollution to the fullest constitutional extent").

Between enactment of the Clean Water Act in 1972 and passage of the 1977 Amendments to the Act, the federal courts were uniform in their interpretation of "waters of the United States" as extending EPA's and the Corps'

jurisdiction to the limits of the Commerce Clause.[5] Congress ratified this well-settled interpretation when it substantially amended the Act in 1977, and again in 1987, without modification of the key definitional term. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951) (when Congress amended National Labor Relations Act without modification, it accepted the existing administrative construction that had been approved by the courts); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 279 (1977) (where provisions of a statute were repeatedly reenacted in the same form, the Court had "no doubt that Congress has ratified the statutory interpretation" settled in the courts); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (where the courts were unanimous in their interpretation of Title VII requirements, and Congress reenacted the statute without altering that interpretation, despite the introduction of a bill designed to do so, "Congress plainly ratified th[at] construction").[6]

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[5] *See, e.g., Ashland Oil*, 504 F.2d at 1328 (6th Cir. 1974) ("Congress, [in the 1972 Act,] intended to exercise its full constitutional powers"); *Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292, 1296-97 (N.D. Cal. 1974) (following *Holland* and concluding that Congress's exercise of the commerce power [to combat pollution of the nation's waters] is not limited by traditional "navigable waters" definitions"); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1184-87 (D. Ariz. 1975) (same).

[6] Rather than change the definition of "waters of the United States," Congress took other steps to address concerns about the scope of the Section 404 program. The 1977 Amendments added new exemptions for certain farming, construction, road maintenance, and other activities. 33 U.S.C. § 1344(f). Ratification is particularly indicated where, as here, Congress considered overruling an agency interpretation of a key term and instead enacted other ameliorative provisions. *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 707-08 (1995) (Congress focused on the term "harm" in amending the Endangered Species Act and enacted a permit program rather than overrule the Secretary's interpretation); *Riverside Bayview*, 474 U.S. at 137 (Congress debated "waters of the United States" in legislation "specifically designed to supplant" the agency construction and left the agency's interpretation undisturbed).

C. The Court Should Not Alter the Balance of Federal-State Regulatory Authority Established by Congress in the Clean Water Act

Much of SWANCC's Brief is aimed at persuading the Court that current federal environmental policy is inappropriate, because, for example, law review articles say that states have "acted as leaders in environmental regulation," and "adequately protect" local water resources. (Pet. Br. at 29, 30.) SWANCC implies that this case should be used by the Court to restructure the balance of regulatory power established by Congress, shifting power back to the states and localities that SWANCC asserts will do a better job than the Corps and EPA. Under our constitutional system, of course, this is a judgment that is reserved to the people, through their elected representatives.

Moreover, SWANCC is wrong to argue that primary federal authority is no longer necessary. As Professor Oliver Houck has observed:

> The money to be made on coastal, lakeside, riverside, and wetlands development is all but irresistible. State and local governments stand to gain considerable employment and tax revenue as well. The countervailing impacts of any one permit proposal on overall wetlands functions are extremely difficult for any regulator to identify, and are even less persuasive to the permit applicant. The harm from wetland development is cumulative, not individual. . . . [A] state's perspective . . . might differ from that of other states, or the national interest. . . . Nearly every contested federal wetlands permit decision — and they are numerous — is one that, by federal regulation, already received all necessary state approvals. If the interests of receiving states — of downstream and downflight Americans — are going to be represented, those interests will have to be protected by more than an agency of a state. . . .[7]

The spillover effects and the "race to the bottom" that Congress addressed in 1972 continue to threaten water resources and wildlife even in the current federal-state framework. In *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 774-76 (E.D. Va. 1997), for example, EPA was forced to bring a district court action where Virginia, authorized as the lead Clean Water Act permitting agency, had failed to enforce the Act's requirements against a major in-state employer, resulting in thousands of violations and contamination of the Pagan River over a six year period.

In this case, SWANCC describes the review undertaken by Cook County and the Illinois EPA in approving its landfill project. Yet Illinois granted its approval without effectively addressing the substantial harm to habitat resources, local drinking water supplies, and nearby wetlands that the Corps identified — substantial environmental harms that SWANCC did not dispute in the District Court.

As a matter of environmental policy, Illinois and Cook County may value a landfill more than they value the integrity of the water and wildlife resources at issue here. In the absence of federal jurisdiction, many local authorities no doubt would feel similar economic pressures to ignore potential environmental harms — an accurate description of environmental regulation as it existed prior to 1972.

In passing the Clean Water Act, Congress made a different judgment, finding that environmental resources must be protected, for the economic benefit and well being of the Nation as a whole. This case presents *precisely* the type

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[7] Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1252-53 (1995).

of problem that Congress intended to remedy by establishing uniform national water pollution standards and consistent federal administrative and enforcement mechanisms.

II. CONGRESS HAS COMMERCE CLAUSE POWER TO REGULATE CONSTRUCTION AND OPERATION OF A SOLID WASTE LANDFILL THAT WOULD POLLUTE INTRASTATE SURFACE WATERS USED AS HABITAT BY MIGRATORY BIRDS

A. The Commerce Clause Confers Plenary Federal Power Over Economic Activity that Concerns More States than One

Article I, § 8 of the Constitution grants the federal government power to "regulate Commerce . . . among the several States." Since the earliest days of the Republic, the term "commerce" has been broadly construed to encompass "every species of commercial intercourse" that "concerns more States than one." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Under this conception, the Court since 1937 has upheld Congressional regulation of a broad variety of economic activities that are themselves conducted locally, including management of a steel plant, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); cultivation of wheat for personal consumption, *Wickard v. Filburn*, 317 U.S. 111 (1942); operation of a small family restaurant, *Katzenbach v. McClung*, 379 U.S. 294 (1964); participation in extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971); and coal mining, *Hodel v. Virginia Surface Mining Reclamation Ass'n*, 452 U.S. 264 (1981).

To exercise effective control over economic matters of genuinely national concern in modern society, Congress has the power to regulate economic activities that have a substantial effect on interstate commerce in the *aggregate*, even if instances of such activities have little or no effect considered in isolation. *See Hodel*, 452 U.S. at 277

(permitting regulation of activity which "'combined with like conduct by others similarly situated, affects commerce among the several States'") (citation omitted); *Wickard*, 317 U.S. at 127-28 (regulating personal growth and consumption of wheat).

The Commerce Clause grants "plenary authority" to Congress over commerce that concerns more states than one. *Hodel*, 452 U.S. at 276. The "sole restraints" on Congress's exercise of Commerce Clause authority are political, arising from "[t]he wisdom and discretion of Congress, their identity with the people, and the influence which constituents possess at elections . . . ." *Gibbons*, 22 U.S. (9 Wheat.) at 197. Where Congress passes a statute that has the primary effect of regulating economic activity, the Court's review is limited to considering whether there is a rational basis for the finding of substantial interstate economic effects, and whether the means employed are reasonably tailored to the objectives of the statute. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The Court will uphold regulation under the Commerce Clause unless it "is *clear* that there is no rational basis" for a determination that the regulated activity substantially affects interstate commerce. *FERC v. Mississippi*, 456 U.S. 742, 753-54 (1982) (quoting *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981) (emphasis added). Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *United States v. Lopez*, 514 U.S. 549, 562 (1995) (*quoted in United States v. Morrison*, 120 S. Ct. 1740, 1750 (2000)). *See also Heart of Atlanta Motel*, 379 U.S. at 252 (while race discrimination legislation carried no formal congressional findings, record evidenced burdens on interstate commerce); *Perez*, 402 U.S. at 156 (particularized findings not necessary for Congress to legislate).

B. The Clean Water Act Regulates Economic Activity

The activities regulated under the Clean Water Act are obviously and overwhelmingly economic in nature. Discharges of pollutants into surface waters are caused primarily by industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. *See, e.g.*, 40 C.F.R. Parts 403-610 (EPA effluent guidelines for 73 categories of industrial activities, filling over 1500 pages of the Code of Federal Regulations). Indeed, SWANCC concedes, in arguing that the Corps' action here may not be upheld under the Treaty Power, that "[m]any environmental laws regulate commercial activity. . . . As such, they are clearly permissible under the commerce power." (Pet. Br. at 49.)

Federal cases involving Section 404 permits issued by the Corps illustrate the economic nature of the regulated activities. In *Riverside Bayview*, for example, the respondent was a corporation seeking a permit to fill 80 acres of wetlands to prepare for construction of a housing development. 474 U.S. at 124; *see also Wetlands Action Network v. U.S. Army Corps of Engineers*, ___ F.3d ___, 2000 WL 1175081, at *2 (9th Cir. Aug. 21, 2000) (permit sought by developer of 1,000-acre district, to include residential areas, a marina, hotels, and retail establishments); *United States v. Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (permit sought for development of residential subdivision).[8]

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[8] SWANCC cites a study of the Corps' regulation under Section 404 which demonstrates that the overwhelming majority of acreage for which Section 404 permits are sought is intended for commercial, industrial, or other economic use. *See* V. Albrecht & B. Goode, Wetland Regulation in the Real World, ex. 3 (1994) (sampling of Section 404 permit applications in 1992) (cited in Pet. Br. at 38).

SWANCC expresses concern that a "homeowner" might be denied a Clean Water Act permit based on application of the migratory birds jurisdictional nexus test. (Pet. Br. at 31.) That is emphatically not this case, but in any event, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Hodel v. Indiana*, 452 U.S. at 329 n.17.

C. This Case Challenges Regulation of Economic Activity

SWANCC asserts that this is "an as-applied, not a facial challenge," (Pet. Br. at 31 n.12), but then challenges as unconstitutional the "regulation of isolated waters" in the abstract, divorced from the underlying conduct of the human and corporate actors. SWANCC repeatedly attacks the hypothetical scope of the Corps' authority, which it describes as "stretch[ing] to virtually every body of water in the country — including seasonally wet areas in homeowners' backyards, used as a feeding or resting place by birds." (*Id.* at 11.)

Of course, "[i]t has long been this Court's considered practice not to decide abstract, hypothetical, or contingent questions, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 460-61 (1946) (refusing to rule on constitutionality of labor statute as it hypothetically could be applied). SWANCC's argument in the abstract also largely ignores the regulatory framework of the Act. The Clean Water Act regulates project development *activities* that alter the physical and biological integrity of water, not the receiving

waters themselves. *See PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

It is well-settled that the activity of solid waste disposal is "commerce" for purposes of Commerce Clause analysis. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Indeed, if the SWANCC landfill is built, it will be constitutionally required to accept solid waste from outside the state of Illinois, and therefore will itself be within the stream of interstate commerce. *See id.* at 623.

SWANCC is a municipal corporation that proposed to build and operate a 142-acre, $69 million solid waste landfill. (A.R. 15635.) The landfill would receive hundreds of thousands of tons of waste each year, generating millions of dollars of revenue, and employ hundreds of personnel. (A.R. 15622.) This obviously is an "economic endeavor." *Morrison*, 120 S. Ct. at 1750. Accordingly, the Corps' jurisdictional nexus test should be considered under the Court's traditional rational basis standard of review.

D. There is a Rational Basis for Determining that Water Pollution Harm to Migratory Birds, in the Aggregate, Substantially Affects Interstate Commerce

As this Court noted in *Morrison*, an important issue for Commerce Clause analysis is whether the federal program includes an "express jurisdictional element" or nexus test that establishes that the program is "in pursuance of Congress' regulation of interstate commerce." 120 S. Ct. at 1751. The migratory birds jurisdictional nexus test serves this function, guiding the Corps in determining the scope of Clean Water Act jurisdiction on a case-by-case basis. This is one of several nexus tests established under the regulatory definition of "waters of the United States," which include, *inter alia*:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters [which are or could be]:

(1) used by interstate or foreign travelers for recreational or other purposes; (2) the source of fish or shellfish taken and sold in interstate or foreign commerce; (3) used for industrial purposes by industries in interstate commerce; (4) used as habitat by birds protected by migratory bird treaties; (5) used as habitat by other migratory birds which cross state lines; (6) used as habitat for endangered species; or (7) used to irrigate crops sold in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s); 51 Fed. Reg. 41,206, 41,217 (1986).

Pollution or destruction of aquatic habitat in one state reduces the number of birds dependent on that habitat that can be observed or hunted in other states. Congress was concerned about "the systematic destruction of the Nation's wetlands" and noted that these wetlands are "nesting areas for a myriad of species of birds and wildlife." S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4336. Protection of wildlife is an express purpose of the Act. 33 U.S.C. § 1251(a)(2).

The migratory birds jurisdictional nexus test is supported by extensive data regarding impacts on interstate commerce. The U.S. Congress, Office of Technology Assessment issued a report in 1984 finding that in 1980, 5.3 million Americans hunted migratory birds, spending $638 million in the process. OTA, U.S. Congress, *Wetlands: Their Use and Regulation* 52 n.12 (1984). More than 55 million Americans spent almost $10 billion in 1980 to watch and photograph wetlands-dependent birds, many of which are migratory. *Id.* at 7. Approximately 77 million U.S. residents participated in wildlife-related activities in 1996. U.S. Fish & Wildlife Service, *1996 National Survey of Fishing, Hunting & Wildlife Associated Recreation* 22-23, 60 (1997). Expenditures associated with wildlife-related recreational activities — such as travel, lodging, equipment, and books

and magazines — totaled $101 billion in 1996, including $20.6 billion expended on hunting activities and $29.2 billion expended on wildlife-watching activities. *Id.* Out of 17.7 million bird-watchers, 14.3 million people took trips specifically to observe, feed or photograph waterfowl; 9.5 million took trips to view other water-associated birds, such as herons. *Id.* at 45, 90. Migratory bird hunters numbered 3.1 million, who spent $1.3 billion on their activities. *Id.*

Pollution and destruction of isolated waters and wetlands are a principal threat to migratory birds. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 986 (D.C. Cir. 1975); *see also* 1 Secretary of the Interior, *The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region* 20 (1988) ("Prairie potholes [isolated surface waters similar to those at the SWANCC site] are among the most important and also the most threatened ecosystems in the United States. They are prime nesting grounds for many species of North American waterfowl . . . . [providing] up to 50 percent of the U.S. production of migratory waterfowl"). Reduced habitat area not only provides fewer foraging and breeding sites, but also concentrates remaining birds in less space, resulting in increased avian disease and mortality. *Id.* at 29.

Congress has confirmed the link between habitat loss and impacts on migratory birds in a number of statutes. *See, e.g.*, North American Wetlands Conservation Act, 16 U.S.C. § 4401(a)(8) (nationwide loss of wetlands has contributed to serious declines in populations of migratory bird species); Water Bank Act, 16 U.S.C. § 1301 (national public policy to preserve wetlands as migratory bird habitat); Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3901 (wetlands essential for the ultimate survival of migratory birds; enumerating benefits of wetlands to "all citizens of the Nation" and declaring national goal to conserve remaining wetland resources).

Congress, EPA, and the Corps have a rational basis for determining that pollution of intrastate surface waters, taken

in the aggregate, could substantially affect interstate economic activity. The federal courts that have considered the issue have uniformly concluded that use of intrastate waters by migratory birds is sufficiently connected with interstate commerce to permit federal regulation. *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395 (9th Cir. 1995) (use of 12.5 acres of seasonally ponded areas by 55 species of migratory birds sufficient); *Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984) (isolated lake used for recreation, including wildlife observation, with two percent (2%) of visitors from out of state); *United States v. Sargent County Water Resource District*, 876 F. Supp. 1081, 1087 (D.N.D. 1992) (use of isolated sloughs by migratory birds and potentially by interstate travelers supports jurisdiction).

SWANCC argues that pollution of the ponds on its property will not substantially affect interstate commerce. However, the possibility that SWANCC's landfill might not, by itself, affect interstate commerce is irrelevant. Even activity that is seemingly insignificant may be regulated where its "contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). "[W]here a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). As this Court noted in *Hodel v. Indiana*, water pollution is a quintessential example of the type of national economic problem that Congress is empowered to address at the local level under the Commerce Clause. 452 U.S. at 324. *Accord Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding, under *Lopez* and *Morrison*, Endangered Species Act regulation that prohibited taking of reintroduced wolves on private land as necessary part of comprehensive federal program).

E. Even if This Case Challenged Regulation of Non-Economic Activity, Federal Protection of Water Resources and Habitat Meets the Tests of *Lopez* and *Morrison*

1. Congress has well-recognized authority to protect scarce national resources, including wildlife, under the Commerce Clause. Preservation of environmental resources is a traditional and important federal role that has long been upheld by the Court. In *Sporhase v. Nebraska*, for example, the Court noted that ground water was in short supply and needed in many Western states, and that there was therefore "a significant federal interest in conservation as well as in fair allocation of this diminishing resource." 458 U.S. 941, 953-54 (1982). The depletion of ground water was "a national problem" and the Commerce Clause gave Congress "the power to deal with it on that scale." *Id.* at 954; *see also Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir. 1937) (holding that "Congress may lawfully legislate, under the Commerce Clause . . . to protect the game, nongame, and insectivorous birds which migrate").

2. Contrary to SWANCC's argument, this case does not obliterate the distinction between what is national and what is local. SWANCC argues that the Corps acted as a "sort of super zoning board or land use authority," impermissibly encroaching on the traditional jurisdiction of state and local agencies. (Pet. Br. at 28-29.) But the Corps only enforced the requirement of the Act that SWANCC obtain and comply with a permit before discharging pollutants into surface waters. The Corps denied SWANCC's permit application because it would (a) seriously degrade or eliminate habitat used by numerous species of birds and other wildlife; and (b) threaten nearby drinking water supplies and wetlands.

Potential destruction of wildlife habitat, water pollution, and groundwater contamination are not the principal subjects of zoning and land use law. Rather, zoning and land use laws provide for a "uniform plan or design" of community

development, establishing certain siting and building characteristics, such as size (*e.g.*, area in square feet, number of stories), use (residential, commercial, industrial), utility hook ups, signage, building code and safety requirements, and road and transportation access. *See* Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* at 136-37 (ABA 1998) (definition of zoning). "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586 (1987).

Many federal programs limit local police powers to some degree. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (regulating land use that affects endangered species); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* (hazardous substance site cleanup); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a) (reclamation of former strip mines); Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (solid waste disposal); Clean Air Act, 42 U.S.C. § 7607(b) (controlling use of property that affects air quality). However, incidental impacts on local authority are irrelevant. "This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that preempt particular exercises of state police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981) (multiple citations omitted) (rejecting argument that surface mining regulations impermissibly interfered with State police powers by regulating land use).

Moreover, protection of migratory birds has never been viewed as an area of predominantly local concern. Since the early part of this century, the federal government has been active in the protection and preservation of migratory birds through enactment of a series of international migratory bird

treaties. *See Missouri v. Holland*, 252 U.S. 416, 435 (1920) (finding that protection of migratory birds constitutes "a national interest of very nearly the first magnitude" as to which "[i]t is not sufficient to rely on the States").

3. Clean Water Act regulation of pollution of intrastate surface waters used as habitat by migratory birds is not limitless. SWANCC argues that the migratory bird jurisdictional nexus test is unconstitutional under *Morrison* because it would result in "limitless federal regulation." As discussed above, the scope of federal jurisdiction under the Clean Water Act *is* extremely broad, extending to "virtually all surface water in the country." *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987). This broad jurisdiction is necessary to achieve the purposes of the Act — to restore and maintain the chemical, physical, and biological integrity of our Nation's waters. However, this does not mean that regulation under the Act is limitless; it is not.

The Clean Water Act extends to discharges by small family farms; wastewater treatment system operations by towns and villages; shopping mall parking lots upon which rain water flows; dirty bath water running through municipal sewer systems; cooling water discharged by utilities; and filling of wetlands in land development. But this is not the same as unlimited federal regulation of all things everywhere. For example, rain water runoff from parking lots is subject to Clean Water Act *jurisdiction*, but this does not mean that EPA *regulates* all people parking all cars everywhere. Regulated commercial parking lot operations are authorized by a "general permit" issued by EPA, which requires minimal storm water management activities as a means of complying with the applicable federal requirements. *See* 40 C.F.R. § 122.26. Similarly, filling of virtually all wetlands is subject to Clean Water Act jurisdiction, but Congress and the Corps have developed an elaborate system of exceptions and exemptions that have allowed a great deal of wetlands destruction over the last fifteen years, without significant federal regulatory

constraints.[9] *See* 33 U.S.C. § 1344(f) (exemptions from permit requirements).

The Clean Water Act is not unique in providing broad federal jurisdiction where necessary to address a national problem. The Clean Air Act extends to all emissions of hazardous pollutants, whether or not they individually have interstate effects. The Superfund statute governs cleanup at many contaminated hazardous waste sites that have no physical connection whatsoever with other states. The Safe Drinking Water Act applies to isolated intrastate groundwater aquifers as well as to those that cross state lines. The Endangered Species Act prohibits killing of endangered species, even in the privacy of a person's back yard. The Fair Labor Standards Act, Occupational Safety and Health Act, and National Labor Relations Act extend jurisdiction over the vast majority of workers in the United States, but this does not mean that they regulate all workplace activities everywhere. These statutes govern activities that are largely local in nature, which contribute collectively to nationwide problems. But the scope of regulation under these programs is limited by the terms of the regulations themselves. Provided that they are appropriately tailored to meet the harm addressed, the Court will not invalidate such regulations on Commerce Clause grounds. *Hodel*, 452 U.S. at 292. If this Court were to rule in SWANCC's favor, hundreds of similar challenges would be brought seeking strict scrutiny judicial review of interstate commerce connections under these and

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[9] SWANCC paints a picture of the Corps as an overzealous federal regulator running rampant on the rights of innocent developers. Yet of the average of 74,500 Section 404 permit requests received by the Corps each year from 1996 to 1999, only three tenths of one percent (0.3%) were denied. *See* Testimony of Michael Davis, Deputy Assistant Secretary of the Army for Civil Works, before Senate Environment and Public Works Committee, Subcommittee on Air Quality, Wetlands, Private Property, and Nuclear Safety, March 28, 2000.

many other federal environmental, health, and safety programs that regulate economic activities.

Here, the Corps does not interpret the scope of migratory bird jurisdiction to the extremes that SWANCC presents, and it did not apply the test in such a way in this case. As the Seventh Circuit recognized, the Corps' migratory bird test protects waters or wetlands not on the basis of a fleeting migratory bird *presence*, but only where such waters or wetlands are "suitable" for providing actual migratory bird *habitat*. *See SWANCC v. Corps*, 191 F.3d 845, 850 (7th Cir. 1999).

Finally, unlike the programs challenged in *Lopez* and *Morrison*, the Court need not speculate regarding the potential scope of federal regulation in this case. The Corps has applied the current version of the Section 404 program, including the migratory bird jurisdictional nexus test, for more than fifteen years. SWANCC offers no evidence that the Corps has attempted to implement "plenary federal authority over land use." Given the limitations established in the program itself, and the political constraints that would prevent such scenarios, it is clear that the Clean Water Act has not threatened, and will not threaten, the "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754. The Act will continue to be applied to meet the Congressional purpose of restoring and maintaining the integrity of our Nation's waters, and State and local governments will continue to have primary land use and zoning authority, as they would have in this case, but for the substantial *environmental* threats posed by the SWANCC landfill.

CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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